Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

TERRY BELK; DWAYNE COLLINS, ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT,

Petitioners,

v.

WILLIAM CAPACCHIONE, ET AL.,
AND
THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below err when they determined that the Charlotte school system had attained "unitary status" despite the uncontested facts that:

(a) after operating largely integrated facilities for more than a decade, the district in 1992 altered its student assignment mechanism causing a dramatic increase in the number of racially identifiable schools;

(b) the demographic changes in the school system (on which the district court relied to explain and excuse this resegregation) did not begin until the 1990's, the same time that the school system changed its method of assignment;

(c) the school board built 25 of 27 new schools after 1979 in predominantly white suburban areas, in violation of its own policy and the court's express orders on siting schools, with the result of exacerbating the disproportionate burden of transportation on black students that the district court had identified in 1979 as a remaining vestige of prior *de jure* segregation; and

(d) at the same time, the school board allowed the condition of predominantly African-American, inner-city school facilities to deteriorate rapidly?

2. Did the courts below err in applying an "intentional discrimination" standard when determinating whether persisting racial disparities (for example in the condition of predominantly white and predominantly black schools) were vestiges of the dual system whose continuation was antithetical to the achievement of "unitary status"?

3. Did the courts below misconstrue and misapply this Court's decisions in *Board of Educ. v. Dowell*, 498 U.S.

237 (1991) and *Freeman v. Pitts*, 503 U.S. 467 (1992) in determining that the Charlotte school system had attained "unitary status" notwithstanding its consistent failure to comply with the district courts' remedial orders, with the result that vestiges of the *de jure* segregation to which those orders were addressed have not yet been eliminated?

4. Did the courts below err in refusing to consider a remedial plan adopted by the school district after this case was reactivated to finally address its continuing constitutional responsibilities — a plan which demonstrated the practicability of further desegregating its schools and eliminating racial disparities in their operation — on the grounds (stated by the district court) that the plan was only "hypothetical" and objectionable because it proposed race-conscious assignments and (stated by the court of appeals) that a unitary status inquiry does not require consideration of remedial alternatives that remain available?

LIST OF PARTIES

1. Karen Bentley, Respondent;

2. Terry Belk, Petitioner;

3. William Capacchione, Respondent;

4. The Charlotte-Mecklenburg Board of Education, Respondent;

5. Dwayne Collins, Petitioner;

6. Richard P. Easterling, Respondent;

7. Lawrence Gauvreau, Respondent;

8. Michael P. Grant, Respondent;

9. Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board, Respondent;

10. Eric Smith, Superintendent, in his official capacity, Respondent;

11. Charles Thompson, Respondent;

12. Scott C. Willard, Respondent;

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PETITION FOR CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Belk, et al v. Charlotte Mecklenburg Board of Education*, 269 F.3d 305.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a-221a, is reported at 269 F.3d 305. The order of the Court of Appeals on Rehearing, 382a-390a, is reported at 274 F.3d 814.The opinion of the District Court, 222a-367a, is reported at 57 F. Supp. 2d 228. The order of the District Court of April 14, 1999, 368a-376a, is unreported.

JURISDICTION

The Court of Appeals entered its judgment on September 21, 2001, 377a-381a. On December 10, 2001, the Chief Justice extended the time within which this Petition may be filed to and including January 21, 2002, which falls on a legal holiday. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no state shall "deny to any person within its jurisdiction the equal protection of the laws"

STATEMENT OF THE FACTS

Terry Belk and Dwayne Collins petition for certiorari from the September 21, 2001 decision of the *en banc* Fourth Circuit Court of Appeals, *Belk v. Charlotte Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001) (1a-221a)[1], affirming 7-4, the ruling of the district court below that the Charlotte-Mecklenburg Board of Education ("CMS" or "the Board") had attained unitary status in all respects. *Capacchione v. Charlotte Mecklenburg Board of Education*, 57 F. Supp. 2d 228 (W.D.N.C. 1999) (222a-367a).

Initial Proceedings in the Litigation

Belk and Collins are substituted representatives for those black families who originally filed this case in 1965 - an initially unsuccessful challenge to a "freedom of choice" pupil assignment plan that maintained racially segregated schools. See 229a (citing to *Swann v. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D.N.C. 1965)). The district court upheld the plan in 1965, finding that the Board did not have an affirmative duty to desegregate. *Id.* The Fourth Circuit affirmed. *Swann*, 369 F.2d 29 (4th Cir. 1966)

The plaintiffs moved for further relief in 1968 after this Court, in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), imposed on segregated school systems an affirmative duty to desegregate. 229a. The trial court found in April 1969 that approximately 14,000 black students remained in segregated schools, 264a, and concluded that the freedom of choice plan "had left the dual school system virtually intact." 23a, citing *Swann*, 300 F. Supp. at 1372. The court ordered CMS to submit a plan to

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[1] Citations in the form "_____a" are to the Appendix to this Petition, *infra*.

begin desegregation of the schools by the fall of 1969 and suggested some methods for achieving that goal. 231a.

The "school board was slow to act on the court's recommendations" and was criticized by the court for "foot-dragging." 231a, citing *Swann*, 300 F. Supp. 1381, 1382 (W.D.N.C. 1969). The district court approved an interim plan in August 1969 but "expressed reservations that a disproportionate burden of desegregation was being placed on black children." 231a (citing *Swann*, 306 F. Supp. 1291, 1298-99 (W.D.N.C. 1969)).

In November 1969, the court reviewed the effectiveness of the plan and found it had "not been carried out as advertised." 231a, quoting *Swann*, 306 F. Supp. 1299, 1302 (W.D.N.C. 1969). The plan did not have definable goals and did not safeguard against resegregation. *Id.* The district court concluded that the Board had shown "no intention to comply" with its constitutional duties, *id.*, quoting *Swann*, 306 F. Supp. at 1306, and designated a consultant, Dr. Finger, to draw up a plan. *Id.*

In February 1970 the Court adopted Dr. Finger's proposed plan for elementary schools and, with that consultant's modifications, a Board plan for secondary schools. 232a, citing *Swann*, 311 F. Supp. 265, 268-70 (W.D.N.C. 1970). The plan transported students among schools and paired grades from black and white elementary schools to accomplish desegregation. 233a n.6. The Board appealed, and the Fourth Circuit affirmed in part but remanded the elementary school aspect of the plan. *Belk*, 12a.

This Court granted certiorari and reinstated the trial court's orders pending further proceedings. *Capacchione*, 233a, citing *Swann*, 399 U.S. 926 (1970). After additional hearings, the trial court concluded that Dr. Finger's plan was

reasonable. *Id.*, citing *Swann*, 318 F. Supp. 786, 788 (W.D.N.C. 1970). This Court affirmed the orders, holding that district courts could invoke their equitable powers to fashion remedies to eliminate public school segregation. 234a – 235a (citing *Swann*, 402 U.S. 1 (1971)).

Within 60 days of this Court's ruling, CMS moved in the district court to abandon the Finger plan and permit the substitution of a new "feeder" plan. *Belk*, 14a (citing *Swann*, 328 F. Supp. 1346 (W.D.N.C. 1971)). Concerned about resegregation and the placement of additional burdens on African-American children, the district court openly questioned the proposed feeder plan. *Id.*, citing *Swann*, 328 F. Supp at 1350-53. The Board withdrew the plan and later submitted a revised one that the court adopted. *Id.*, citing *Swann*, 334 F. Supp. 623 (W.D.N.C. 1971)). In accepting the revised plan, the court "continued to express its dissatisfaction with the regressive and unstable nature and results" of the Board's plans and actions. *Capacchione*, 235a, citing *Swann*, 328 F. Supp. 1346 and 334 F. Supp. 623.

The district court declined to hear any additional matters until 1973, "in the hope that the board and its staff would undertake constructive remedial action." *Id.*, citing *Swann*, 362 F. Supp. 1223, 1230 (W.D.N.C. 1973). It did not happen.

> [W]ithin just two years it became clear that CMS's revised feeder plan was inadequate "for dealing with foreseeable problems" in the dismantling of the dual system. The district court found "that various formerly black schools and other schools will turn black under the feeder plan" and that "racial discrimination through official action has not ended in this school system." The district court again instructed CMS to design a new pupil assignment plan "on the premise that equal protection of the laws

is here to stay."

Belk, 14a, quoting *Swann*, 362 F. Supp. at 1229, 1230, 1238 (W.D.N.C. 1973). The district court detailed the "signs of continuing discrimination," including the busing burden placed on blacks, the pressures for resegregation created both by the feeder plan and by the operation of overcrowded white schools with mobile classrooms while historically black schools had empty seats, and the "substantial immunity from busing afforded to students in white areas in the east and southeast of the county." 362 F. Supp. at 1232-34.

In 1974 the Board adopted, and the court approved, a new series of policies and guidelines for pupil assignment that had originally been devised by a citizens' group. *Capacchione*, 235a – 236a; 15a, citing *Swann*, 379 F. Supp. 1102 (W.D.N.C. 1974). The district court called these new policies a "clean break" from past practices and attitudes. "If implemented according to their stated principles," the policies would result in a unitary school system. *Capacchione*, 236a, quoting *Swann*, 379 F. Supp. at 1103. The principles incorporated in the plan included avoiding majority black schools (with one elementary school experiment excepted), more equally distributing the busing burden, and guidelines for transfers to prevent "adverse trends in racial make-up of schools." *Id.* (citing to 379 F. Supp. 1104). See, also *Belk*, 15a (citing to 379 F. Supp. at 1105-1110). The principles also committed CMS to plan school sites in order to simplify rather than to complicate desegregation. *Swann*, 379 F. Supp. at 1104 (Guideline XI).

The district court's 1974 order approved the creation of "optional" schools with countywide enrollment. *Capacchione*, 236a. The court approved these schools, presently referred to as "magnet" schools, on the express condition that they not become freedom of choice havens for segregation or cause resegregation in any regular school. *Id.*

In 1975, noting that "continuing problems remain, as hangovers from previous active discrimination," the court expressed a confidence that the Board would address those problems, and placed the case on inactive status. *Capacchione*, 236a, quoting *Swann*, 67 F.R.D. 648, 649 (W.D.N.C 1975)).

Litigation Resumes; Problems Persist

A few years later, the court found that many forms of discrimination persisted. In 1978 a group of white parents sued to end the use of race in assigning students and to block a proposed reassignment. 240a (citing *Martin v. Charlotte Mecklenburg Bd. of Educ.* 475 F. Supp. 1318 (W.D.N.C. 1979)). The *Martin* plaintiffs alleged that CMS was now "unitary", and thus any consideration of race in assigning students was unconstitutional. *Martin*, 475 F. Supp. at 1322, 240a. Representative black families intervened in *Martin*, and alleged that CMS was not yet unitary, pointing to non-compliance with four aspects of the *Swann* orders – school siting, placement of early elementary grades in black areas, monitoring of student transfers to avoid resegregation, and placing burdens unduly on black children. *Martin*, 475 F. Supp. at 1328-29. In 1979 the same court that had decided *Swann* heard the evidence in *Martin*, and "re-examined and considered hundreds of pages of findings of facts and orders" from *Swann*, and concluded that "jurisdiction was still needed due to lingering effects from past active discrimination." 241a.

The court detailed at length the problems that remained in the four areas. First it held that the "CONSTRUCTION, LOCATION AND CLOSING OF SCHOOL BUILDINGS CONTINUE TO PROMOTE SEGREGATION." *Martin* 475 F. Supp. at 1329 (caps in original). The court reviewed several post-1974 siting decisions by CMS. It noted that, contrary to its orders, CMS

had, after 1974, built new schools in white neighborhoods and then bused black students into those schools to desegregate them. It found these siting decisions violated the principles approved by the court for the placement of schools. *Id.* at 1331-1332.

It held next that the "PLACEMENT OF KINDERGARTEN AND ELEMENTARY SCHOOL GRADES REMAINS DISCRIMINATORY AND UNFAIR TO THE SMALLEST BLACK CHILDREN." *Id.* at 1332. The court reviewed the fact that (with one exception) grades K-3 in school pairings were located exclusively in schools in white residential areas, leaving the busing burden entirely on the youngest black children. *Id.* at 1332-1334.

The court next held that CMS's "FAILURE TO MONITOR THE THOUSANDS OF PUPIL TRANSFERS . . . TENDS TO PROMOTE SEGREGATION IN THE SCHOOLS." *Id.* at 1335. The court found that CMS was not effectively monitoring the transfers of students among schools, which allowed transfers that cumulatively tended to to make certain schools become racially identifiable. *Id.* at 1335-1338

Finally, the court found that the "DISCRIMINATORY BURDENS OF DESEGREGATION REMAIN UPON THE BLACK CHILDREN." *Id.* at 1338. The Court explained various ways in which CMS continued to place the burdens of desegregation on black students, who were bused on longer routes and for more years than white students. *Id.* at 1338-1340. "In short, black children and their families continue to bear discriminatory burdens of desegregation." *Id.* at 1340.

The court concluded that each of these four problem areas was "interrelated with and not separable from . . . the pupil assignment portion of the desegregation effort." *Id.* at

1332, 1334, 1337 and 1340. As a result, "'[r]acially neutral attendance patterns' have never been achieved." *Id.* Despite these findings, the court restated its belief that CMS was committed to addressing the issues and concluded CMS needed more time. "I vote to uphold their efforts to date, and to give them that time." *Id* at 1347.

By 1980 black enrollment in the school system had reached 40%. *Capacchione*, 241a. The Board and the *Swann* plaintiffs moved jointly to modify the court orders to allow any elementary school to have a black enrollment up to 15% above the system-wide ratio of black students. *Id.* Notwithstanding the failures to fully implement the prior orders described in detail in many of the *Swann* orders and in *Martin*, CMS was able to keep most of its schools within *Swann's* racial balance guidelines in the 1970's and 1980's. 264a – 265a.

Major Student Assignment Changes Produce More Racially Identifiable Schools

In 1992, with black enrollment still at 40%, CMS undertook a major modification of pupil assignment – a plan it called "A New Generation of Excellence", 242a.[2] The new

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[2] The population of Charlotte had increased substantially from 1970 to 1997, but the percentage of blacks living in the county remained stable during this growth, increasing slightly from 24% in 1970 to 27% in 1997. 237a. This period of overall growth with relative racial stability was marked by the dispersion of blacks into suburban areas. 238a. As a result "there is a greater degree of residential integration in the county than there was thirty years ago," and "Charlotte has become one of the most racially integrated cities in America." *Id.* 238a.

At the time of the 1969 desegregation decrees, CMS enrolled about 84,000 students, 239a. In the 1998-1999 school year, CMS had 98,542 pupils, *id.*, an increase of about 14,500 students over 30 years. While racial enrollments were unstable in the years immediately following the desegregation orders, increasing from 29% black in 1969 to 40% in 1980, 241a, the percentage of black enrollment then stabilized.

assignment plan greatly expanded the use of the voluntary optional or magnet schools and phased out the "unpopular" mandatory pairing of schools from black and white areas. 242a. The plan also contemplated the increased use of "stand alone" schools in integrated areas and schools in "mid-point" areas with the stated goal of phasing out satellite zones. 242a – 243a. CMS took this major initiative without seeking court approval. 243a.

The trend toward resegregation of CMS's schools accelerated markedly following the decision to phase out pairings. *Belk*, 152a (Motz and King, dissenting). From 1992 to 1998, the number of blacks in identifiably black schools increased 50% system-wide, *id.*, and nearly 200% at the high school level, *Stevens report*, p. 21 (Fourth Circuit Jt.App. 9589). By 1998, some 30% of CMS's African-American students were attending racially identifiable schools.[3] *Belk*, 152a (Motz & King, dissenting). Twenty-three schools were identifiably black at the time of trial. *Id.* Twenty of those schools had been outside the court guidelines for at least three consecutive years after 1992. *Capacchione*, 57 F. Supp.2d at 248. Prior to the magnet expansion and the end of pairing, CMS had been able to maintain racial balance for periods of nineteen to twenty-six years in nearly all of these schools. *Belk*, 28a (Motz & King, dissenting).

In the 1998-99 school year, black enrollment was 42%. 239a. Following a period of overall decline until 1990, student enrollment then began growing by about 3,000 students per year. *Id.* Such growth was not unprecedented, however: at the time of the original 1969 decrees, CMS had been growing at a rate of 2,500 to 3,000 students per year. *Swann*, 300 F. Supp. at 1358, 1364 (W.D.N.C. 1969).

[3] Translated from percentages to numbers, over 12,000 black students were in segregated schools in 1998-99, compared to 14,000 at the time of the 1969 finding that CMS still operated segregated schools.

While deviations from target enrollment percentages at schools in the 1970s had involved variances of "one or two percent," 265a, and only a "few" schools were consistently out of balance in the 1980's. *Id.* Both the number of out-of-compliance schools and the extent of racial identifiability increased substantially after 1992.

No CMS school had been as high as 60% black until 1988. 263a. "Only seven schools have ever had black populations in excess of 75%, and this did not occur until 1994." *Id.* The black population at six of those schools jumped fifteen to twenty-five percentage points after adoption of the new pupil assignment plan. Other schools showed similar increases in racial identifiability after 1992. The number of black students enrolled increased more than 20% at West Charlotte High School (from 46% to 68%), Ranson Middle School (45% to 65%), Wilson Middle School (45% to 71%), Coulwood Middle School (35% to 55%), Merry Oaks Elementary (41% to 64%), Pawtuckett Elementary (37% to 59%) and Greenway Park Elementary (39% to 60%). CMS Ex. 47 (4th Cir. Jt. App. 13095 – 13099). Other schools' imbalances increased in only slightly less dramatic fashion, including Hawthorne Middle School (36% to 53%), West Mecklenburg High School (38% to 54%) and Garinger High School (49% to 61%), and the following elementary schools, Oaklawn (45% to 63%), Huntingtowne Farms (47% to 62%), Allenbrook (50% to 65%), Druid Hills (51% to 63%), Sedgefield (52% to 62%), Shamrock Gardens (51% to 61%) and Statesville Road (48% to 60%), *Id.*

The extent of identifiability increased at the predominantly white schools as well. Prior to 1992-93, no school had been 90% white; after 1992, there were eight schools with 90% or more white enrollment. *Id.* More generally, the schools with low black enrollments in 1999

that had been in operation since the 1970s had been racially balanced for most of the period prior to the changes in pupil assignment in 1992. *Belk*, 28a n.4 (Motz & King, dissenting).

The *Capacchione* court identified a problem inherent in numerous voluntary transfers under the magnet scheme. "[I]f enough students left their assignment zones for magnets, it would affect the balance of the schools to which they were otherwise assigned." 266a. Compare *id.* n. 23 (referring to overall impact of magnet schools' operation but not analyzing the Board's failure to have "rigid controls in place"). The resegregative impact of transfers of non-black students away from indentifiably black schools to magnet schools was significant. Data for 1998-99 from CMS Ex. 55 (4th Cir. Jt. App. 13165-13193) shows that at the middle school level, 44.3% of the assigned non-black students transferred away to magnets from four middle schools that were at least 60% black, compared to a rate of 18.4% of non-blacks transferring to magnets from all other middle schools. At the high school level 31% of non-blacks assigned to the four high schools that were 50% or more black transferred away to magnets, compared to 8.5% of non-blacks from the remaining high schools.

The 1992 assignment plan also included the proposal to increase the number of schools located "mid-point" between racially distinct areas. *Capacchione*, 242a – 243a & n.10. This proposal fit within the 1974 order, which held that "[b]uildings are to be built where they can readily serve both races." 270a, quoting *Swann*, 379 F. Supp. at 1107. The *Martin* court had found that CMS had yet to comply with this aspect of the pupil assignment orders as of 1979, *Martin*, 475 F. Supp. 1329-32. The *Martin* court specifically criticized CMS for building schools in white residential areas and then busing black students to them from distant areas.

CMS has built twenty-seven new schools since *Martin*, see Capacchione, 271a. Twenty-five of them in were located in predominantly white residential areas. *Belk*, 156a (Motz & King, dissenting). The "mid-point" approach was applied in locating, "at most, four of the twenty-seven new schools." *Id.* The purpose of the mid-point policy was to reduce the use of satellite zones. *Capacchione*, 242a – 243a. Because the mid-point policy was never applied, "CMS has had to create dozens of tiny satellite zones in the inner city" to assign black students to schools in white neighborhoods. 247a. Thus, as student enrollment increased, CMS coped with the situation by adding more satellite zones for black students, assigning them to newly built schools in white neighborhoods.

While the original court order in 1969 created nine satellite zones, by 1998 there were sixty-nine. See, 280a, citing CMS Exs. 262 – 264 (4th Cir. Jt. App. 15411 – 13). The 1992 plan abolished the use of nearly all of the "unpopular" satellite zones in white areas; instead one-way satellites from black neighborhoods became the predominant tool for desegregating schools. Sixty-three of the sixty-nine satellites, or 91 percent, were located in black neighborhoods. CMS Exs. 262 – 264. Of the 16,409 students assigned to schools by satellite, 14,957 lived in predominantly black neighborhoods. *Foster Report, Table 7. CMS Trial Exhibits 262-64.* Thus, while some of the new schools "have been able to accommodate racially balanced student populations," *Capacchione,* 57 F.Supp. at 252, this result could be achieved only by busing black children into distant white neighborhoods.

In addition, disparities in facilities and resources remain a serious problem. As CMS built new schools in white areas, it allowed many of the older facilities, attended predominantly by black students, "to fall into a state of

disrepair," *Belk*, 156a (Motz & King, dissenting). The only facilities expert to testify at the trial, Dr. Gardner, provided numerical assessments of CMS schools showing "substantial" racial disparities in the condition of facilities. *Id.* at 166a – 168a. Numerous witnesses confirmed his assessment of the problem. *Id.* at 168a – 169a. *Capacchione*, 296a – 297a. Even the three Board members, who had voted before the trial that CMS should seek unitary status, each testified that the Board needed to address disparities in facilities and resources in black schools. *Id.* *Belk*, 169a (Motz & King, dissenting).

The Present Phase of the Case

In September 1997, William Capacchione, a white parent, filed suit challenging the use of race in magnet school admissions. *Capacchione*, 243a. In October 1997 the *Swann* plaintiffs moved to reactivate *Swann*, alleging that CMS was not in compliance with the court's orders, and moved to consolidate the two proceedings. 244a. In March 1998 the District Court denied a Board motion to dismiss the *Capacchione* suit, granted the request to reactivate *Swann*, and consolidated the two cases, finding that the issue of unitary status was the common question between them. *Id.* In May 1998, a separate group of white parents called the Grant plaintiffs were allowed to intervene in the consolidated action, claiming that the system was unitary and the use of race in assigning students was unconstitutional. *Id.*

That same year, CMS undertook a "comprehensive analysis" of its record of compliance, whether vestiges of segregation existed and whether practicable remedial measures could be taken. *Belk*, 146a – 147a (Motz & King, dissenting). The Board then publicly adopted "The Charlotte Mecklenburg Schools' Remedial Plan to Address the Remaining Vestiges of Segregation." *Id.* The Remedial

Plan "detailed specific steps that the Board proposed to undertake" to attain unitary status. *Id.*

The Board produced the plan as an exhibit for trial, but the court granted a motion *in limine* to exclude it, finding that the Court was required to review only "what CMS had done, not what it may do in the future." Order of April 14, 1999 (373a). Thus, the court refused to allow into evidence any information on what practicable steps the Board could take to remedy the increasing racial imbalances, to address school siting and facilities issues, to relieve the unequal transportation burdens and to address racial disparities in the various *Green* factors and student achievement.

The court entered an order on September 9, 1999, finding that CMS had attained unitary status in all respects and that the magnet program's application process was unconstitutional. The court enjoined CMS from any consideration of race in the future. The Fourth Circuit stayed the injunction in an unpublished order. The *en banc* court vacated a panel decision that had reversed the finding of unitary status as to student assignment, transportation, facilities and resources and student achievement. *Belk v. Charlotte Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir. 2000) (vacated). The *en banc* court then voted 7-4 to affirm the unitary status determination, 6-5 to reverse the finding that the school board acted unconstitutionally in adopting the magnet plan while under court order, voted unanimously to reverse as to the injunction, and voted 6-5 to reverse the order awarding attorneys' fees to Grant and Capacchione. 5a. The court then denied reconsideration of the attorney's fees' issue. *Belk*, 274 F.3d 814 (4th Cir. 2001).

REASONS FOR GRANTING THE WRIT

I

The Court Below Ignored Basic Principles of School Desegregation Jurisprudence Established by this Court When It Affirmed the Unitary Status Holding Despite the School Board's Resegregative Changes in Student Assignments and Its School Location and School Repair and Maintenance Practices

This case presents fundamental legal questions under this Court's jurisprudence as to the conditions under which previously *de jure* segregated school systems can attain "unitary status" and be released from court supervision.

The court below ruled that CMS had attained unitary status even though the district had changed its student assignment policies without court approval, and then failed to monitor the segregative effect of transfers under its new assignment plan, both of which caused significant increases in the number of racial identifiable schools and the extent of segregation at those schools. From 1980 to 1997, the school board had also built 25 of 27 new schools in white residential areas while allowing existing schools in black areas to deteriorate. The changes in pupil assignment, in conjunction with the siting practices, fostered resegregation and intensified the burdens placed upon black students in the desegregation process.

These actions by CMS perpetuated or created classic vestiges of segregation recognized by this Court's precedent. Nonetheless, the majority of the court of appeals found that CMS had complied with the outstanding desegregation orders and had eliminated the vestiges of segregation to the extent practicable. This departure from settled principles established by this Court, in a widely publicized case that directly impacts the hundreds of school systems remaining

under court order, compels review of the judgment below.

Changes in Pupil Assignment While Under Court Order.

In 1992 CMS substantially modified its pupil assignment policies without court approval. The system's previous student assignment plan had maintained desegregation in "all but a few" of CMS's schools until the 1992 revisions, notwithstanding population growth in the county. The new student assignment plan rapidly phased out the "unpopular," court-approved system of mandatory pupil assignment to racially paired elementary schools that "fed" into assigned middle and high schools, replacing it with a major expansion of magnet schools. The board then failed to monitor the resegregative effects of student transfers to this increased number of magnet schools. Under the new plan, the number of schools outside of racial enrollment guidelines, and the levels of segregation at those schools, increased dramatically, due both to the "de-pairing" of previously paired schools and the impact of transfers.

CMS's action modifying its student assignment scheme while under a court desegregation order, in a manner that increased the number of identifiably black schools and the number of black students attending segregated schools, distinguishes this case fundamentally from the two major unitary status cases previously decided by this Court, *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Freeman v. Pitts*, 503 U.S. 467 (1992). In neither of those cases did the school board, knowing it remained under court supervision, substantially modify its pupil assignment plan in a manner that resegregated its schools.

Dowell. In *Dowell*, the school board had implemented a court-ordered desegregation plan in 1972. 498 U.S. at 241. In 1977 the trial court declared the school system "unitary" and ended active supervision of the case.

Id. Believing it was no longer under a desegregation order, the Oklahoma City Board of Education adopted a student reassignment plan ("SRP") that significantly increased the number of racially identifiable schools. *Id.*, at 242. The plaintiffs challenged the SRP as violating the court injunction, which they asserted had never been lifted. This Court concluded that because the 1977 order did not explicitly vacate the earlier injunctive decrees, they remained in effect. *Id.* at 244-45. However, the Court also found that the school board had acted with a good faith belief that it was no longer under court order when it adopted the SRP. *Id.* at 249 n.1. Under those unique circumstances, the Court remanded the case for a determination of whether the school board had been entitled to a unitary status declaration in 1985 when it adopted the SRP, without considering the decision to adopt the SRP or its effects on racial segregation in the system. *Id.* at 249-50.

Because *Dowell* was decided in 1991, the year *before* CMS modified its student assignment policies, CMS and its staff fully understood that the district remained under the court's desegregation orders when it shifted to the expanded magnet plan. (In fact, the magnet plan consultant advised CMS to obtain court approval of the changes.) Thus, CMS' decision to remake pupil assignment is wholly different from the circumstances surrounding adoption of the SRP in *Dowell.*

Freeman. The case is similarly distinct from *Freeman.* First, this Court found that the DeKalb County schools had implemented a court-approved desegregation plan in 1969 that established race-neutral student assignments and desegregated the schools before the process was overwhelmed by dramatic changes in the racial demographics of the county. 503 U.S. at 478-79. This Court considered the attendance patterns established in DeKalb to

be "race-neutral" just as in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). In Charlotte, however, the trial court had ruled in 1979 that "racially neutral attendance patterns have never been achieved," in specific and detailed distinction from *Spangler*. *Martin*, 475 F. Supp. at 1322-24, 1340.

Second, the DeKalb County school system had not changed its method of student assignment with segregative results. Prior to its application for unitary status, the only significant change in pupil assignment methods in *Freeman* came in 1976, when the court ordered the DeKalb system to expand its Majority-to-Minority ("M to M") transfer program, and when the DeKalb board introduced a small number of magnet schools. 503 U.S. at 473, 479.[4]

In CMS, the method of pupil assignment changed fundamentally in 1992, with significant "resegregative effect." Those effects - sharp increases in the number of racially identifiable schools and the extent of segregation at those schools, caused by school board action - persisted at the time of the district court's hearing as vestiges of a segregated school system.

Demographic Change

The court below distorted this Court's ruling in *Freeman* by applying it to CMS to hold that population growth within Mecklenburg County over thirty years, rather than the school board's actions in 1992, explained the sharp increases in segregation within the system from 1992 to 1999.

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[4] The trial court examined about 170 adjustments to attendance zones made within the framework of the court- ordered plan and found "only three had a partial resegregative effect." *Id.*

However, comparisons between the changes in racial demography in DeKalb and Mecklenburg counties show no commonality. Black pupil enrollment in DeKalb shot up from less than 6% in 1969 to 47% in 1986. 503 U.S. at 475. In the ten years before the DeKalb school system applied for unitary status, its overall elementary enrollment fell 15%, but black elementary enrollment still increased 86%; overall high school enrollment dropped 16%, while black high school enrollment increased 119%. *Id.* at 476. These dramatic changes resulted from an influx of tens of thousands of black residents into the southern part of the county and a commensurate exodus of whites that reshaped the county into racially distinct poles. *Id.* at 475.

In contrast, the black population in Mecklenburg County changed only from 24% in 1970 to 27% in 1997. 237a. Black student enrollment in CMS remained at a constant 40% for the decade preceding CMS's revisions to student assignment in 1992. 239a. These stable racial demographics coincided with increasing residential integration in the community from 1970 to 1997. 238a. Thus, CMS had maintained desegregation in all "but a few" of its schools when it decided to revamp its student assignment scheme. 265a.

The misapplication of *Freeman's* acceptance of a demographic explanation for resegregation to the markedly different circumstances in CMS requires review and correction by this Court.

Location Of New Schools

The courts below also misapplied this court's precedent in assessing the legal consequence of CMS's school siting decisions. This Court recognized in *Swann* itself, involving this very school district, that building new school facilities in predominantly white areas distant from

residential concentrations of minority students would "lock in" patterns of segregation that typified the dual system. 402 U.S. at 20-21. In *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 460 (1979), the Court reiterated that formerly segregated districts have an affirmative responsibility to ensure that school construction practices "do not serve to perpetuate or re-establish the dual school system." The duty applies to "the selection of sites for new school construction that had the foreseeable and anticipated effect of maintaining the racial separation of the schools." *Id.* at 462. The "failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Id.* at 459 (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413-14 (1977) and other cases). In affirming the trial court's "unitary status" holding, the Fourth Circuit ignored these fundamental principles.

Despite marginally higher rates of growth in the school-age population in black residential areas from 1980 to the time of trial, CMS located 25 of 27 new schools in white residential areas, accelerating resegregation when CMS changed its pupil assignment methods in 1992 and putting the burden of desegregating those new schools almost entirely upon black children. Instead of locating schools in areas midway between racially distinct areas, CMS built schools in predominantly white areas and transported black pupils there to achieve some degree of desegregation in those new schools. This directly ignored the district court's directives in *Swann*, which required CMS to locate schools in places readily accessible to both races and to lessen the burdens placed on black families by desegregation. See *Martin*, 475 F. Supp. at 1329-1332; 1338-1340.

This case accordingly presents important questions about the continuing vitality of the principles established in *Swann* and *Penick* that this Court should resolve.

Deterioration Of Schools In Predominantly African-American Areas

The impact of building new schools in white residential areas upon the racial identifiability of the district's schools was compounded by the Board's failure to adequately maintain and provide resources in the schools located in the black residential areas. Racial disparities in the facilities of a formerly dual school system have long been recognized as a vestige of the segregated system. *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 435 (1968). The courts below, contrary to this Court's precedent, found that these disparities in facilities (and in resources) were not vestiges of desegregation because they had not been shown to be the result of intentional discrimination by the board. 40a. See Argument II *infra*.

II

Contrary to Decisions of this Court, the Majority Below Held That Racial Disparities in Various Areas of the School District's Operations Were Not Vestiges of the Dual System Absent a Showing That They Resulted from Intentional Discrimination

In *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979), this Court stated clearly that "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." (citing *Wright v. Council of City of Emporia*, 407 U.S. 451, 460, 462 (1972) and other cases).

Nevertheless, in assessing whether racial disparities in school siting, burdens of transportation, and the quality of facilities located in white or black residential areas that existed at the time of trial were vestiges of the prior dual

system, the majority below incorrectly applied an intentional discrimination standard. *E.g.*, 33a ("CMS never sited schools in order to foster segregation."); 34a ("The evidence does not indicate that the abandonment of the ten percent rule or other decisions regarding school siting were the result of a desire to perpetuate the dual system or circumvent the district court's orders,"); 40a (district court "concluded that any disparity as to the condition of the facilities [in black and white neighborhoods] that might exist was not caused by any intentional discrimination by CMS," a finding that "is clearly determinative of the question of unitary status as to facilities."); 35a (considering burdens of busing and approving "district court's conclusion that the realities of the current situation should not block a unitary status determination" even though the "current realities" to which district court referred were the location of new schools in white areas and the creation of numerous inner-city satellites from which black pupils were transported, 273a-274a, school district practices to which the courts below applied an intentional discrimination standard).

The emphasis of the majority of the court of appeals on the necessity to show post-1970's intentional discrimination to establish that current disparities are vestiges of the prior dual system is contrary to the controlling decisions of this Court. It had two related effects, moreover that require review and reversal of the judgment below: first, it removed the presumption applicable in *de jure* school segregation cases that ongoing racial disparities in the operation of the schools are causally related to the dual system; second, it shifted the burden of proof from those seeking to end the district court's jurisdiction - the party moving for unitary status - to the original plaintiffs. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 207-211 (1973).

III

The Court Below Departed From Established Precedent In Declaring The Charlotte School District Had Attained Unitary Status Without Requiring The School District To Comply With Outstanding Desegregation Orders.

Under *Dowell* and *Freeman*, a school district must demonstrate compliance with the outstanding orders of the court before it can be released from court supervision. *See, e.g., Freeman*, 503 U.S. at 492. Yet the courts below declared that CMS had attained unitary status even though the history of the case and the trial record showed that the system had never complied with express orders designed to further desegregation. Certiorari should be granted to review and reverse this stark departure from this Court's standards for determining unitary status.

From 1969 until 1973 the Board repeatedly challenged the district court's authority to order desegregation, and the court entered numerous specific orders to accomplish that result. In 1974, the Board adopted guidelines for desegregation that the court embraced as a break from the Board's previous attitude, with the caveat that the principles must be implemented to end the litigation. The court was emphatic:

> The future depends upon the implementation of the new guidelines and policies. This approval is expressly contingent upon the implementation and carrying out of all the stated policies and guidelines. Here is the heart of the matter. Only if they are thus implemented is it likely that a fair and stable school operation will occur, and that the court can close the case.

Swann, 379 F. Supp. at 1103. In 1979, the same judge ruled in *Martin* that the *Swann* orders, including the guidelines from 1974, had not been implemented in specific areas. The facts from the trial record showed, and the school board admitted, that CMS had not, since *Martin*, complied with the prior orders regarding the location of new schools, the monitoring of student transfers to prevent resegregation, and the balancing of the burdens of desegregation. Despite the undisputed facts of non-compliance in these areas, the courts below declared that CMS had attained unitary status.

The courts below reconciled this record of non-compliance by dismissing the significance of *Martin*. The courts found the "concerns" of that case had no relevance to the unitary status inquiry because *Martin* had not itself been a unitary status hearing. The court of appeals declared that consideration of CMS's continued non-compliance with the *Swann* orders as outlined in *Martin* "would defy common sense and run afoul of developments in the Supreme Court's school desegregation jurisprudence." *Belk*, at 32a.[5] That holding, however, is flatly inconsistent with *Freeman's* requirement that a school board must demonstrate its "commitment to the *entirety* of a desegregation plan" in order to attain unitary status, 503 U.S. at 498. The school board must show that compliance with all orders entered in the desegregation case, not just selective acquiescence with some. *See Dowell*, 498 U.S. at 249-50. ("The District Court should address itself to whether the Board has complied in good faith with the desegregation decree since it was entered, *and* whether the vestiges of past discrimination had been eliminated to the extent possible) (emphasis supplied); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437-

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[5] The dissent in the court of appeals found the findings in *Martin* "are as binding on the parties as any others made in the course of this litigation." *Belk.* at 155a, n. 10 (*Motz and King dissenting*).

40 (1976) (until modified or vacated by court with authority to do so, injunctive decrees must be obeyed even if they contain provisions contrary to rulings issued by this Court subsequent to their entry), *citing Walker v. City of Birmingham*, 388 U.S. 307 (1967) and *United States v. United Mine Workers*, 330 U.S. 258 (1947). That reasoning of the court of appeals misapprehends the holdings in *Freeman* and *Dowell* and requires review and reversal by this Court.

IV

The Court Below Erroneously Sanctioned The Trial Court's Refusal To Consider The School District's Proposal For Eliminating The Vestiges Of Segregation To The Extent Practicable

The heart of the *Dowell/Freeman* test is that a formerly segregated school district must eliminate the vestiges of segregation to the extent practicable. Courts have long recognized the primacy and importance of allowing local school boards to determine in the first instance what measures might most effectively and practicably accomplish its constitutional obligations. The school district here made just such a determination by adopting and submitting to the court a remedial plan with specific proposals for complying with the orders of the court and eliminating the vestiges of discrimination within a specified period of time.

The district court not only refused to consider the Board's plan; it refused to even allow it into evidence, thus completely ignoring the most probative and relevant evidence on the question of eliminating the vestiges and ignoring the strong and long tradition of federal courts' deferring to local school board efforts to desegregate local schools. This Court recognized that tradition in its decision in this case:

> Remedial judicial authority does not put judges automatically in the shoes of school authorites whose powers are plenary. Judicial authority enters only when local authority defaults. School authorities are traditionally charged with broad power to formulate and implement educational policy.

Swann, 402 U.S. at 16. It was only after the school authorities repeatedly defaulted in their obligation to develop a plan in the original case that Judge McMillan adopted a plan developed by a court appointed consultant.

The ultimate rationale for the district court's refusal to admit and consider the Board's remedial plan was the court's objection to "the plan's cardinal fixation on racial preferences", 279a-283a. Of course, however, a desegregation plan must take race into account. *See North Carolina State Bd. of Ed. v. Swann*, 402 U. S. 43 (1971); *McDaniel v. Barresi*, 402 U. S. 39 (1971). The court rejected the plan because it did what a desegregation plan is supposed to do -- take race into account.

The majority below affirmed the district court's refusal to consider the plan, although it did not adopt the district court's rationale. Nonetheless, the rationale adopted by the majority is likewise flawed. The majority's statement that *Freeman* and *Dowell* do not mandate consideration of the remedial plan in determining the issue of vestiges (53a-55a) signals a fundamental misreading of those cases. *Freeman* and *Dowell*, as well as *Green*, do mandate consideration of the Board's plan because the plan demonstrates that there is more that the Board can practicably do to eliminate the vestiges. There is simply nothing in any of those cases that supports or suggests that a plan developed by the school board and offered as a demonstration that continuing racial disparities linked to the

original dual system can be eliminated or reduced can or should be ignored by the court.

The majority's alternative rationale, that the refusal constitutes harmless error, is equally flawed, if not more so. The majority looked at the plan, although the plan was not made a part of the record nor analyzed by the district court, and pronounced it both duplicative of other evidence (54a) and "short on specifics" (55a). This approach flagrantly confuses the appropriate roles of trial and appellate courts and warrants the exercise of this Court's supervisory authority over lower federal courts.

On its face, the plan is powerfully probative on the important student assignment issues in the case. The district court and the court below excused continued racially identifiable schools on the grounds that demographics and logistics required construction of most new schools in white suburbs and limited the extent to which (at least white) pupils could be transported for desegregation purposes. The CMS "controlled choice" plan at least offered a realistic promise of substantially reducing the level of racial isolation and identifiability at many schools without engaging in logistically impossible transportation or creating greater reassignment burdens. Surely it should have been evaluated on the record by the trial court rather than ignored. To find unitary status without even assessing its promise through the adversary process and formal findings that can be properly reviewed by an appellate court makes a mockery of the careful instructions about unitary status determinations this Court gave in *Dowell* and *Freeman*.

CONCLUSION

In *Dowell* and *Freeman* this Court established the parameters for ending court supervision of formerly *de jure* school systems. The case below, widely followed in its trial

and appellate phases, particularly by the hundreds of school systems that remain under court supervision, greatly distorts and even inverts the standards established by this Court. The decisions below, left unreviewed, promise the nation an end to school desegregation decrees even where a school district has taken actions that resegregate its schools, where it has not complied with outstanding orders of the court and where tangible vestiges of segregation exist. The practical steps a district knows it could take to comply with the prior orders and eliminate the persisting unresolved racial disparities in the operation of its schools will be irrelevant. A board's failure to meet its affirmative constitutional duties under a desegregation order will be excused simply if that failure was not intentional. The burden will now be on the black plaintiffs to show not that tangible vestiges of the *de jure* era still persist, but to prove that those continuing disparities are the result of new, intentional discrimination. Such a result is a complete and dramatic departure from this Court's school desegregation precedent and compels this Court's review.

Respectfully submitted,

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United States Court of Appeals,
Fourth Circuit.

Terry BELK; Dwayne Collins, on behalf of themselves and the class they represent, Plaintiffs-Appellants,

William Capacchione, Individually and on behalf of Christina Capacchione, a minor; Michael P. Grant; Richard Easterling; Lawrence Gauvreau; Karen Bentley; Charles Thompson; Scott C. Willard, Plaintiffs-Appellees,

v.

The CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; Eric Smith, Superintendent, in his official capacity; Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board,in his official capacity, Defendants.

United States of America; North Carolina School Boards Association; National School Boards Association, Amici Curiae.

William Capacchione, Individually and on behalf of Christina Capacchione, a minor; Michael P. Grant; Richard Easterling; Lawrence Gauvreau; Karen Bentley; Charles Thompson; Scott C. Willard, Plaintiffs-Appellees,

and

Terry Belk; Dwayne Collins, on behalf of themselves and the class they represent, Plaintiffs,

v.

The Charlotte-Mecklenburg Board of Education; Eric Smith, Superintendent, in his official capacity; Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board, in his official capacity, Defendants-Appellants.

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Opinions of the Court of Appeals of September 21, 2001

United States of America; North Carolina School Boards Association; National School Boards Association, Amici Curiae.

Nos. 99-2389, 99-2391, 00-1098 and 00-1432.

Argued Feb. 27, 2001.
Decided Sept. 21, 2001

[269 F.3d 305]

***310 ARGUED:** Stephen Luke Largess, James Elliot Ferguson, II, Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, NC; John W. Borkowski, Hogan & Hartson, L.L.P., Washington, DC, for Appellants. Allan Lee Parks, Parks, Chesin & Miller, P.C., Atlanta, GA, for Appellees. **ON BRIEF:** John W. Gresham, C. Margaret Errington, Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, NC; Elaine R. Jones, Director-Counsel, Norman J. Chachkin, Gloria J. Browne, NAACP Legal Defense & Educational Fund, Inc., New York, NY; Allen R. Snyder, Maree Sneed, Hogan & Hartson, L.L.P., Washington, DC; James G. Middlebrooks, Irving M. Brenner, Amy Rickner Langdon, Smith, Helms, Mulliss & Moore, L.L.P., Charlotte, NC; Leslie Winner, General Counsel, Charlotte- Mecklenburg Board of Education, Charlotte, NC, for Appellants. Kevin V. Parsons, Parks, Chesin & Miller, P.C., Atlanta, GA; John O. Pollard, McGuire, Woods, Battle & Boothe, Charlotte, NC; William S. Helfand, Magenheim, Bateman, Robinson, Wrotenbery & Helfand, Houston, TX; Thomas J. Ashcraft, Charlotte, NC, for Appellees. Bill Lann Lee, Acting Assistant Attorney General, Mark L. Gross, Rebecca K. Troth, United States Department of Justice,

Washington, DC, for Amicus Curiae United States. Michael Crowell, Lisa Lukasik, Tharrington Smith, L.L.P., Raleigh, NC; Allison B. Schafer, General Counsel, North Carolina School Boards Association, Raleigh, NC; Julie K. Underwood, General Counsel, National School Boards Association, Alexandria, VA, for Amici Curiae Associations.

***311** Before WILKINSON, Chief Judge, and WIDENER, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, KING, and GREGORY, Circuit Judges.

Affirmed in part and reversed in part by published opinions. A per curiam opinion announced the judgment of the court. Judge TRAXLER delivered the opinion of the court with respect to Parts I, II, IV, and V, in which Chief Judge WILKINSON and Judges WIDENER, WILKINS, NIEMEYER, and WILLIAMS joined, and an opinion with respect to Parts III and VI, in which Judges WILKINS and WILLIAMS joined. Chief Judge WILKINSON wrote an opinion concurring in part in which Judge NIEMEYER joined. Judge WIDENER wrote an opinion concurring in part and dissenting in part. Judge LUTTIG wrote an opinion concurring in the judgment in part and dissenting from the judgment in part. Judges MOTZ and KING wrote a separate opinion in which Judges MICHAEL and GREGORY joined.

OPINION

PER CURIAM:

This case was argued before the en banc Court on February 27, 2001. The parties presented a number of issues

for our consideration, including whether the district court erred in (1) finding that unitary status had been achieved and awarding attorneys' fees to plaintiff-intervenors based on this finding; (2) holding that the establishment of a magnet schools program was an ultra vires, unconstitutional act justifying an award of nominal damages and attorneys' fees; (3) enjoining the Charlotte-Mecklenburg School Board from considering race in the future assignment of students or allocation of educational resources; and (4) sanctioning the Board for failing to comply with the district court's discovery order.

Having considered the briefs and arguments of the parties, a majority of the Court holds: (1) by a 7-4 vote (Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler in the affirmative), the school system has achieved unitary status, but by a 6-5 vote (Chief Judge Wilkinson and Judges Niemeyer, Michael, Motz, King and Gregory in the affirmative) attorneys' fees for work done on the unitary status issue are denied; (2) by a 6-5 vote (Chief Judge Wilkinson and Judges Niemeyer, Michael, Motz, King, and Gregory in the affirmative), the Board did not forfeit its immunity for the establishment of the magnet schools program, and nominal damages and attorneys' fees in that regard are denied; (3) by a unanimous vote, the injunction is vacated; and (4) by a unanimous vote, the imposition of sanctions is affirmed.

The judgment of the district court is therefore affirmed on the finding of unitary status and the imposition of sanctions, reversed as to the finding of liability for nominal damages for the establishment of the magnet schools program, reversed as to the imposition of attorneys' fees for any reason, and reversed on the issuance of the injunction.

Unitary status having been achieved, the judgment of the district court vacating and dissolving all prior injunctive orders and decrees is affirmed. The Board is to operate the school system without the strictures of these decrees no later than the 2002-2003 school year.

AFFIRMED IN PART AND REVERSED IN PART.

TRAXLER, Circuit Judge:

This case is hopefully the final chapter in the saga of federal court control over the Charlotte-Mecklenburg Schools ("CMS"). Since 1971 CMS has operated under a federally supervised desegregation plan that included limited use of racial ratios, pairing and grouping of school zones, and extensive busing. So successful was the plan that the district court removed the case from the active docket in 1975, expressing its belief that the once reluctant school board was committed to achieving desegregation and was already *312 well on the way toward a unitary school system. Since then, two generations of students have passed through CMS and, until the present case, not one person has returned to court alleging that segregative practices have been continued or revived.

Now, nearly three decades later and prompted by a lawsuit filed by a white student challenging the magnet schools admissions policy, the question of whether CMS has achieved unitary status has been placed before our courts. In 1999, the district court, after a lengthy hearing and searching inquiry, concluded that CMS had indeed achieved unitary status by eliminating the vestiges of past discrimination to the extent

practicable. This conclusion was not reached in haste; it was the result of a two-month hearing and an examination of extensive testimony and evidence relating to every aspect of CMS's educational system.

A majority of this court now affirms the district court's holding on this issue, satisfied that CMS has dismantled the dual school system. In sharp contrast to the situation in the late 1960s, when black students were segregated in black schools and taught by a predominantly black staff, CMS students today are educated in an integrated environment by an integrated faculty. Nor do we turn over control to an indecisive and uncommitted school board. CMS currently operates under the firm guidance of an integrated school board which has clearly demonstrated its commitment to a desegregated school system.

In sum, the "end purpose" of federal intervention to remedy segregation has been served, and it is time to complete the task with which we were charged--to show confidence in those who have achieved this success and to restore to state and local authorities the control of their school system. Consequently, a majority of this court affirms the district court's unitary status determination.

However, while a majority of my colleagues agree that CMS has achieved unitary status, and have graciously joined me on this point, I respectfully depart from a separate majority's decision to reverse the district court's holding that CMS's magnet schools program, which was implemented in 1992, was an ultra vires, unconstitutional act justifying an award of nominal damages and attorney fees. By denying children, on account of their race, an equal opportunity to compete for open, *unclaimed* slots in CMS's extraordinary magnet program, I

believe the school board pushed too far and did more than either was required or permitted. Just as the educational process of the 1960s unconstitutionally deprived black children of educational opportunities *solely* on account of their race, the magnet schools admissions policy deprives white children of educational opportunities *solely* on account of their race. Consequently, I depart from the separate majority in that I would affirm the district court's conclusion that the magnet schools program violated the Equal Protection Clause of the Fourteenth Amendment and the liability of the school board for the violation.

I.

In 1896, the Supreme Court upheld a Louisiana statute "providing for separate railway carriages for the white and colored races." *Plessy v. Ferguson,* 163 U.S. 537, 540, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The *Plessy* majority characterized the statute as "not necessarily imply[ing] the inferiority of either race," *id.* at 544, 16 S.Ct. 1138, but the first Justice Harlan, in dissent, aptly described the true aim of the law: "Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons," *id.* at 557, 16 S.Ct. 1138 (Harlan, J., dissenting). ***313** Justice Harlan further "den[ied] that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved." *Id.* at 554- 55, 16 S.Ct. 1138 (Harlan, J., dissenting). Unfortunately, the principle of "separate but equal" reached much farther than Louisiana railways, and was applied to other public services, including education. The march of progress eventually proved the

correctness of Justice Harlan's principled stand. Segregation, in all of its manifestations, was "arbitrary" and "wholly inconsistent with the civil freedom and the equality before the law established by the Constitution." *Id.* at 561-62, 16 S.Ct. 1138 (Harlan, J., dissenting).

Early efforts aimed at combating the injustice wrought by *Plessy* in educational settings often centered on state-funded graduate and professional schools. *See, e.g., Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *see generally* Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education 1925-1950* (1987). In *Gaines,* an African-American student was denied admission to the University of Missouri School of Law on account of his race. Missouri had no "separate but equal" law school for its African-American citizens and instead offered to pay Gaines' tuition and expenses for a legal education in another state. The Supreme Court held that Missouri's offer denied Gaines equal protection of the laws. The Court observed that "[t]he admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." *Gaines,* 305 U.S. at 349, 59 S.Ct. 232. Though providing only small victories, cases like *Gaines* exposed "separate but equal" for the untenable proposition that it was.

In 1954, the Supreme Court recognized the futility of measuring equality in segregated facilities. *See Brown v. Board of Educ.,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*). Presented with a direct attack on *Plessy* in a secondary education case, the Court held that "segregation of children in public schools solely on the basis of race" violated

the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 493, 74 S.Ct. 686. The Court emphasized that an educational "opportunity, where a state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* Recognizing that segregation differed from locality to locality, the Supreme Court subsequently declined to craft a broad, one-size- fits-all remedy, and instead instructed the federal district courts to oversee the implementation of appropriate relief based on the dictates of local circumstances. *See Brown v. Board of Educ.*, 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*) ("Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform th[e] judicial appraisal."). The district courts were directed to make use of the "traditional attributes of equity power," *id.* at 300, 75 S.Ct. 753, to ensure that students were "admit [ted] to public schools on a racially nondiscriminatory basis," *id.* at 301, 75 S.Ct. 753. However, under the *Brown* opinions it was unclear whether a school district was required to take affirmative steps to remedy the constitutional violation, *see, e.g., Briggs v. Elliott,* 132 F.Supp. 776, 777 (E.D.S.C.1955) (holding that *Brown* merely prohibited school districts from using the force of law to separate the races), and very little progress resulted.

Before the Supreme Court provided further guidance to the lower federal courts, in 1965 the *Swann* plaintiffs, who were the original class action plaintiffs representing the interests of African-American children ***314** in the district, challenged as constitutionally inadequate the efforts of CMS in complying with *Brown.* The school district's desegregation plan was based on freedom of choice whereby "any child, without regard to race, and without regard to minority or majority of race in any particular school, might freely transfer

to another school of his choice." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 243 F.Supp. 667, 668 (W.D.N.C.1965). The district court approved the plan, observing that more could be done "to increase mixing of the races," but that the law imposed "no such duty upon ... the School Board." *Id.* at 670.

Concerned at the slow pace of school desegregation throughout the nation, the Supreme Court held in 1968 that school boards had an "affirmative duty" to end the state-imposed dual system of education. *Green v. County Sch. Bd.*, 391 U.S. 430, 437, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). The Justices underscored that "in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself." *Id.* at 440, 88 S.Ct. 1689. The *Swann* plaintiffs then filed in the district court a motion for further relief "seek[ing] greater speed in desegregation of the Charlotte-Mecklenburg schools, and request[ing] elimination of certain other alleged racial inequalities." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F.Supp. 1358, 1360 (W.D.N.C.1969). The district court, guided by the mandate of *Green, see Swann*, 300 F.Supp. at 1362, made a number of factual findings and concluded that the school district remained highly segregated.

The district court noted that over half of CMS's 24,000 African-American students "attend schools that are all black, or very nearly all black, and most of the 24,000 have no white teachers." *Id.* at 1360. However, the court found no violations "in the use of federal funds; the use of mobile classrooms; quality of school buildings and facilities; athletics; PTA activities; school fees; free lunches; books; elective courses; nor in individual evaluation of students." *Id.* at 1372.

The district court directed CMS to submit "a positive plan for faculty desegregation effective in the fall of 1969, and a plan for effective desegregation of pupil population, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970." *Id.* at 1360. The board procrastinated, but eventually submitted an enervated desegregation plan that the district court approved "with great reluctance" on a temporary basis. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F.Supp. 1291, 1298 (W.D.N.C.1969). CMS officials, however, continued to drag their feet, and the district court was forced to appoint its own expert, Dr. John A. Finger, to craft an efficacious desegregation plan. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F.Supp. 265 (W.D.N.C.1970). Dr. Finger's plan, adopted by the district court, included limited use of mathematical ratios, pairing and grouping of school zones, and busing. *See id.* We affirmed a portion of the plan, but vacated provisions dealing with the busing of elementary school students because of the perceived burdens on small children and the cost of purchasing new buses. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138, 147 (4th. Cir.1970) (en banc). We remanded "for reconsideration of the assignment of pupils in the elementary schools." *Id.* The Supreme Court granted certiorari and reinstated the district court's plan pending further proceedings. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 399 U.S. 926, 90 S.Ct. 2247, 26 L.Ed.2d 791 (1970). The district court conducted eight days of hearings and examined five different desegregation plans. The district court concluded the Finger plan to be the best of the five, encompassing "a reasonable ... collection of methods for solving the problem" of the dual system. ***315***Swann v. Charlotte- Mecklenburg Bd. of Educ.*, 318 F.Supp. 786, 800 (W.D.N.C.1970). As for busing and the cost of new buses, the district court found that the Finger plan

took "proper advantage of traffic movement" and that new buses would cost only $660,000, a far cry from the millions of dollars that CMS had originally estimated. *See id.* at 797-98. Two months later, the Supreme Court granted certiorari and undertook an in-depth review of the power of the federal district courts to craft such sweeping desegregation remedies. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

The Supreme Court affirmed the desegregation plan adopted by the district court, and in the course of its opinion identified and offered guidance in "four problem areas." *Id.* at 22, 91 S.Ct. 1267. First, the Court addressed the issue of the district court's use of racial ratios. While the Supreme Court approved of a limited use of mathematical ratios in a plan crafted by a district court, it emphasized that such ratios were "a starting point ... rather than an inflexible requirement." *Id.* at 25, 91 S.Ct. 1267. The Court reminded district courts that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24, 91 S.Ct. 1267. Second, the Court dealt with single-race schools. Though the Court concluded that schools consisting of predominantly one race were not per se unconstitutional, the Court instructed the district courts to utilize "close scrutiny to determine that school assignments are not part of state-enforced segregation." *Id.* at 26, 91 S.Ct. 1267. Third, the Court considered alterations of attendance zones. The Court held "that the pairing and grouping of noncontiguous school zones is a permissible tool," *id.* at 28, 91 S.Ct. 1267, but declined to craft "rigid rules" in light of differing local circumstances, *id.* at 29, 91 S.Ct. 1267. Finally, the Court tackled the busing issue. The Court confirmed that a district court could order

"bus transportation as one tool of school desegregation," but within reasonable time and distance restrictions. *Id.* at 30, 91 S.Ct. 1267.

Shortly after the Supreme Court issued its landmark *Swann* opinion, CMS asked the district court to abandon the Finger plan and permit the substitution of a "feeder plan" whereby schools would draw pupils from designated attendance areas in an effort to keep children together for their entire public school career. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 328 F.Supp. 1346 (W.D.N.C.1971). Citing concerns of resegregation and the placement of additional burdens on African-American children, the district court questioned the feeder plan. *See id.* at 1350-53. CMS then withdrew its original feeder plan and began work on a modified version. *See id.* at 1353. The district court eventually approved a revised feeder plan that reopened several former black schools and prevented over- and under-utilization of facilities. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 334 F.Supp. 623 (W.D.N.C.1971).

However, within just two years it became clear that CMS's revised feeder plan was inadequate "for dealing with foreseeable problems" in the dismantling of the dual system. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 362 F.Supp. 1223, 1229 (W.D.N.C.1973). The district court found "that various formerly black schools and other schools will turn black under the feeder plan," *id.*, and that "[r]acial discrimination through official action has not ended in this school system," *id.* at 1230. The district court again instructed CMS to design a new pupil assignment plan "on the ***316** premise that equal protection of laws is here to stay." *Id.* at 1238.

In 1974 CMS adopted and the district court approved new guidelines and policies for pupil assignment. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F.Supp. 1102 (W.D.N.C.1974). The plan was designed by a citizens advisory group working with the board in an effort to reach "an acceptable consensus" on school desegregation in CMS. *Id.* at 1103. The plan's most promising features were the avoidance of any majority black schools (with the exception of Hidden Valley, an exempted school), and a more equal distribution of the busing burden. *See id.* at 1105-1110. Praising the board for making "a clean break with the essentially 'reluctant' attitude which dominated Board actions for many years," the district court predicted that the policies and positive attitude would eventually result in a unitary school system. *Id.* at 1103.

The district court closed *Swann* in 1975 and removed the case from the active docket. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 67 F.R.D. 648 (W.D.N.C.1975). In so doing, the district court observed that the board was "actively and intelligently addressing" recurrent problems related to dismantlement of the dual system. *Id.* at 649. The district court was so satisfied with the progress being made that it questioned whether it would ever be confronted with a motion to reopen the litigation. *See id.*

For three years there was no action in the case. This changed in 1978 when a group of white parents sought to enjoin CMS from reassigning over 4000 students in an effort to maintain racial balance in certain schools. *See Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F.Supp. 1318 (W.D.N.C.1979). The parents attacking the 1978 student assignment plan "offered no live evidence but offered and relied upon a few written exhibits and admissions from the

pleadings." *Id.* at 1321. Not surprisingly, the district court rejected the parents' challenge to the student assignment plan and praised CMS for its zeal in dismantling the dual system.

In 1980, CMS and the *Swann* plaintiffs again returned to the district court. The parties informed the district court that the African-American student population in CMS's elementary schools had grown from twenty-nine percent to forty percent, making it difficult to avoid predominantly black student bodies. To provide the board with some flexibility, the district court permitted operation of elementary schools with African-American student bodies of plus fifteen percent above the district-wide average. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, No.1974 (W.D.N.C. Apr. 17, 1980).

Since 1980, neither the board nor the *Swann* plaintiffs have approached the district court regarding alteration of the earlier desegregation orders. And, until the present litigation, the *Swann* plaintiffs have never attempted to reopen the case in order to address any alleged failure by the board to comply with the district court's desegregation orders.

The controversy before us today arose in September 1997 when William Capacchione ("Capacchione") filed suit against CMS on behalf of his daughter, Cristina, alleging that she had been unconstitutionally denied admission to a magnet school program on account of her race. In 1992, without prior court approval, CMS had adopted a desegregation plan focused mainly on the use of magnet schools. In filling magnet schools, CMS had instituted a black and a non-black lottery to achieve racial balance. If a sufficient number of blacks or whites did not apply and fill the seats allotted to their respective races, then CMS would actively recruit children *317 of the desired

race despite lengthy waiting lists made up of children of the other race. If the recruitment drive failed, CMS usually left the available slots vacant. Cristina, who is white, was placed on a waiting list and eventually denied admission to a program at the Olde Providence magnet school, which CMS marketed as "a school to benefit everyone." J.A. XXXII-15,670.

The original *Swann* plaintiffs moved to reactivate *Swann* and to consolidate it with Capacchione's suit. They asserted that the vestiges of the dual school system had not been abolished and that the use of race in the magnet admissions policy was necessary for the school district to comply with the prior desegregation orders. The district court granted the motion and later permitted Capacchione to intervene in the *Swann* litigation. Seeking a finding that CMS had eradicated the vestiges of past discrimination, another group of parents, led by Michael P. Grant ("Grant"),[1] was also permitted to intervene in the litigation.

After a two-month bench trial, the district court determined that CMS had achieved unitary status, that the race-based admissions policy for CMS's magnet schools fell outside prior orders and was not narrowly tailored to achieve a compelling state interest, and that an injunction was warranted. The district court "enjoin[ed] CMS from any further use of race-based lotteries, preferences, and set-asides in student assignment." *Capacchione v. Charlotte- Mecklenburg Schs.*, 57 F.Supp.2d 228, 292 (W.D.N.C.1999). Citing interests in stability, the district court concluded that the injunction would not affect student assignments for the 1999 2000 school year,

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[1]Those represented by Capacchione and Grant will be referred to as the "plaintiff-intervenors."

but would apply to student assignments for the 2000-2001 school year. *See id.* at 292 n. 52. The district court awarded Capacchione nominal damages in recognition of the constitutional violation and also awarded the plaintiff-intervenors attorney fees. CMS and the *Swann* plaintiffs filed notices of appeal, and CMS moved to stay the injunction, except as applied to the magnet schools, until the 2001-02 school year. The *Swann* plaintiffs moved for a complete stay pending appeal. On November 15, 1999, the district court denied the motions. CMS and the *Swann* plaintiffs, pursuant to Federal Rule of Appellate Procedure 8(a)(2), moved this court for a stay. On December 30, 1999, we stayed the district court's injunction pending further order of this court.

After briefing and appellate arguments, a divided panel of this court vacated and remanded the district court's unitary status determination, holding that the district court's findings were insufficient in the areas of student assignment, facilities and resources, transportation, and student achievement. As for CMS's magnet schools admissions policy, the panel held that the policy was specifically permitted by prior court orders and that the policy did not violate the Constitution. The panel also vacated the district court's injunction, the award of nominal damages, and the award of attorney fees. *See Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir.2000). A majority of the active circuit judges thereafter voted to hear this appeal en banc.

II. Unitary Status

The district court's unitary status finding is reviewed for clear error. *See Riddick v. School Bd.*, 784 F.2d 521, 533 (4th

Cir.1986); Fed.R.Civ.P. 52(a). "A ***318** finding is clearly erroneous when, although there is evidence to support it, on the entire evidence the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Faulconer v Commissioner,* 748 F.2d 890, 895 (4th Cir.1984). In clarifying the clearly erroneous standard, the Supreme Court has explained:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The Supreme Court also stressed that even when appellate review is based primarily on documentary evidence, the clearly erroneous standard of review remains the same. *See id.* at 574, 105 S.Ct. 1504. So long as the district court's unitary status determination rests on a permissible view of the evidence, it must be affirmed.

The Supreme Court has declined to define or provide a "fixed meaning" for the term "unitary." *Freeman v. Pitts,* 503 U.S. 467, 487, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). However, in light of the aim of *Brown I,* which was "the elimination of state-mandated or deliberately maintained dual school systems," *Milliken v. Bradley,* 418 U.S. 717, 737, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (*Milliken I*), a school system must be declared unitary when it no longer

discriminates between children on the basis of race, *see Green,* 391 U.S. at 442, 88 S.Ct. 1689. The burden of proof falls on the party seeking an end to court supervision. *See Freeman,* 503 U.S. at 494, 112 S.Ct. 1430.

In undertaking a unitary status inquiry, a court must ask "whether the Board ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Board of Educ. v. Dowell,* 498 U.S. 237, 249-50, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991). Implicit in the Supreme Court's use of the term "practicable" is "a reasonable limit on the duration of ... federal supervision." *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 760 (3d Cir.1996); *see also Dowell,* 498 U.S. at 247, 111 S.Ct. 630 ("From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."). Hence, the goals of a desegregation order not only encompass a remedy for the violation, but also prompt restoration of local control. *See Freeman,* 503 U.S. at 490, 112 S.Ct. 1430 ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.... Where control lies, so too does responsibility."); *Milliken I,* 418 U.S. at 741-42, 94 S.Ct. 3112 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

Among the most important reference points in determining whether a school board has fulfilled its duties so

that local control may be resumed are the factors set out in *Green:* student assignment, faculty assignment, facilities and resources, transportation, staff assignment, and extracurricular activities. *See *319Green,* 391 U.S. at 435, 88 S.Ct. 1689. In its discretion, a court conducting a unitary status hearing may consider other relevant factors not mentioned in *Green. See Freeman,* 503 U.S. at 492, 112 S.Ct. 1430. We address the district court's consideration of each factor in turn, but only to determine whether "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Anderson,* 470 U.S. at 573-74, 105 S.Ct. 1504.

A. Student Assignment

Student assignment is perhaps the most critical *Green* factor because state-mandated separation of pupils on the basis of race is the essence of the dual system. *See Freeman,* 503 U.S. at 474, 112 S.Ct. 1430 (observing that the issue of student assignment is "fundamental" because "under the former de jure regimes racial exclusion was both the means and the end of a policy motivated by disparagement of ... the disfavored race"). To determine whether a school was racially balanced or imbalanced, the district court adopted a plus/minus fifteen percent variance from the district-wide ratio of black to white students. *See Capacchione,* 57 F.Supp.2d at 246. However, the district court emphasized "that there is no level of compliance with the standard that is determinative." *Id.* When schools are outside the variance, a "reasonable and supportable explanation[ ]" will suffice. *Id.*

The district court did not err in adopting a plus/minus fifteen percent variance. Considering that the only variance ever approved by the district court in the course of the *Swann*

litigation was a " 'plus 15%' from the district-wide average," *id.* at 245, the addition of a minus fifteen percent is reasonable. Moreover, the Supreme Court has permitted a "limited use ... of mathematical ratios" by district courts, *Swann,* 402 U.S. at 25, 91 S.Ct. 1267, and much higher variances have been used to define desegregation, *see Manning v. Hillsborough County Sch. Bd.,* 244 F.3d 927, 935 (11th Cir.2001) (using a plus/minus twenty percent variance); *see generally,* David J. Armor, *Forced Justice: School Desegregation and the Law* 160 (1995) (observing that in over seventy percent of the school districts with desegregation plans where racial balance is measured by numerical standards, a variance of plus/minus fifteen percent or greater is used).[2] In sum, the plus/minus fifteen percent variance is clearly within accepted standards, and provides a reasonable starting point in the unitary status determination.

1. CMS's Compliance Record

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[2]At trial, Dr. Eric Smith, the current superintendent of CMS, testified that unitary status depended on every school being in balance. *See* J.A. XV-7187 & 7239. This is not the law. *See Swann,* 402 U.S. at 24, 91 S.Ct. 1267 ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.").

We find equally erroneous the *Swann* plaintiffs' assertion at appellate argument before the panel that "[t]he issue of how many schools are balanced has never been a question in this case." App. Tr. 91. The racial composition of schools goes to the heart of a desegregation case, and is very much key to a review of the district court's declaration of unitary status. *See Swann,* 311 F.Supp. at 268 (ordering CMS to assign pupils "in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students").

The district court began by observing that since 1970, of the 126 schools in operation, "only twenty schools (16%) have had black student bodies higher than 15% above the district-wide ratio for more than three years, and only seventeen schools ***320** (13%) have had black student bodies lower than 15% below the district-wide ratio for more than three years." *Capacchione,* 57 F.Supp.2d at 248 (footnote omitted). In addition, the district court found that CMS has not operated a single-race school since 1970. *See id.*

The district court also turned to two desegregation indices: the dissimilarity index and the index of interracial exposure. The former "measures the degree of racial imbalance, and it is derived by comparing the racial composition of each school to the district-wide composition," J.A. XXXIII-16,172, and the latter measures "the average percent white in schools attended by black students, weighted by the proportion of black students in each school." J.A. XXXIII-16,172. According to the report of the plaintiff-intervenors' expert witness, Dr. David J. Armor, a dissimilarity value of twenty or below signifies "a highly balanced school system" and a score under thirty signifies "a substantially desegregated system." J.A. XXXIII-16,172. CMS's dissimilarity score was sixteen in 1980 and twenty-six in 1995. From this it is clear that CMS quickly desegregated in the 1970s and continues to maintain a "substantially desegregated system." The dissimilarity index also indicates that CMS has better racial balance than several comparable districts did when they were declared unitary. *See* J.A. XXXIII-16,173.

The index of interracial exposure, like the dissimilarity index, shows that CMS has made great leaps of progress. A score of zero on the exposure index signifies total segregation,

while a score of fifty or above indicates a "highly desegregated system." J.A. XXXIII-16,172. Schools in CMS typically score above fifty, whereas before the desegregation order the schools' scores hovered near twenty or below. *See* J.A. XXXIII-16,194-96.

CMS and the *Swann* plaintiffs correctly point out that the data suggest that in recent years racial imbalance has increased in some schools. Aware of this trend, the district court made a number of findings on growth and demographic change in the Charlotte-Mecklenburg area. The most revealing findings are as follows:

- the county population has increased from 354,656 in 1970 to 613,310 in 1997
- in 1970 the school district was the forty-third largest in the nation and is today the twenty-third largest
- among cities with more than 500,000 people, Charlotte ranks second in population growth in the 1990s
- the racial composition of the county has changed from seventy-six percent white and twenty-four percent black in 1970 to sixty-eight percent white, twenty-seven percent black, and five percent other in 1997
- the current racial composition of schoolchildren is fifty percent white, forty-two percent black, and eight percent other
- as the county has become more suburban the inner city and nearby suburbs have lost large numbers of white residents as they spread farther out into the formerly rural sections of the county
- some middle suburban communities that were once all white are now predominately black
- the rural black population in the southern part of the

> county has remained relatively constant while the white population has tripled because of suburbanization

See Capacchione, 57 F.Supp.2d at 236-39. These findings are supported by the report of the plaintiff-intervenors' expert in demographics, Dr. William Clark. *See* J.A. ***321** XXXIII-16230-306. Accordingly, the district court concluded that "[t]here can be no doubt that demography and geography have played the largest role in causing imbalance." *Capacchione*, 57 F.Supp.2d at 250.

Testimony from Dr. John Murphy, CMS's superintendent from 1991 to 1995, corroborates the district court's conclusion. Dr. Murphy testified that when he assumed his duties he "was quite concerned about the increasing difficulty in bringing about racial balance ... because of the demographic shifts that were occurring." J.A. VI-2712. Population growth translated into more automobiles on the road, making increased busing impracticable because "the travel time to move youngsters from the suburbs into the city with the flow of rush hour traffic was a problem." J.A. VI-2732. In the fall of 1991, CMS hired Dr. Michael J. Stolee to examine the problem and offer solutions. Dr. Stolee also concluded that CMS's task "has been complicated by population growth," J.A. XXXII-15,571, and he recommended the adoption of a magnet schools program, which CMS promptly implemented.

The Supreme Court has dealt with similar population growth and shifting demographics in the context of unitary status. In *Freeman*, the court unequivocally stated that "racial imbalance ... [is] not tantamount to a showing that the school district [is] in noncompliance with the decree or with its duties

under the law." 503 U.S. at 494, 112 S.Ct. 1430. *Brown I,* of course, does not mandate that racial balance be pursued in perpetuity. Once the original racial imbalance caused by a constitutional violation has been rectified, "the school district is under no duty to remedy imbalance that is caused by demographic factors." *Freeman,* 503 U.S. at 494, 112 S.Ct. 1430.

The *Swann* plaintiffs contend that consideration of demographics and the rationale of *Freeman* are misplaced because the growth and shifting demographics of DeKalb County, Georgia, the school district under court order in *Freeman,* exceeded that of Charlotte-Mecklenburg. While CMS's growth rates and demographic shifts certainly do not equal those experienced in DeKalb,[3] we can find nothing in *Freeman* limiting its holding to the specific facts of DeKalb County or establishing DeKalb as the standard for measuring imbalance caused by demographic factors. On the contrary, the opinion speaks in general terms. The Supreme Court observed that in the United States "it is inevitable that the demographic makeup of school districts, based as they are on political subdivisions such as counties and municipalities, may undergo rapid change." *Id.* at 495, 112 S.Ct. 1430. Mobility, the Court noted, "is a distinct characteristic of our society." *Id.* at 494, 112 S.Ct. 1430.

Similarly, the *Swann* plaintiffs contend that unlike DeKalb County, Mecklenburg County has become more

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[3]For example, the population of DeKalb County grew from 70,000 in 1950 to 450,000 in 1985, and the percentage of black students in the district grew from 5.6 percent in 1969 to forty-seven percent in 1986. *See Freeman,* 503 U.S. at 475, 112 S.Ct. 1430.

integrated as the black population has increased. This is simply not true. For example, a report prepared in 1992 by the Charlotte-Mecklenburg Planning Staff for Chairman Arthur Griffin concluded that "Charlotte-Mecklenburg continues to be a city of segregated neighborhoods" with "[c]oncentrations of Black households ... generally located in the central city." J.A. XXI-10,485; *see also* J.A. XXVIII-13,803 (1992 student assignment plan stating that "housing across the county is not racially integrated. Approximately 50% of all *322 black students live within one district, while only 10% of white students reside in that district."); J.A. XXII-10,575 (CMS report chronicling growth of the black population and decline of the white population in the inner city). Clearly, increased housing integration is not necessarily a corollary of African-American population growth. Hence, despite the *Swann* plaintiffs' best efforts, *Freeman* cannot be distinguished into nothingness, nor does the standard of review permit this court to reweigh the evidence of the changes in CMS.

We also note that when confronted with growing imbalance in certain schools, the district court demanded cogent and supportable explanations from the plaintiff-intervenors, paying special attention to the former de jure schools still in use. *See Capacchione,* 57 F.Supp.2d at 246. Evidence presented at trial indicated that "[o]f the 16 former black schools that are still open, 13 are currently balanced and have been desegregated for periods ranging from 22 to 28 years. Of the 3 that currently exceed the +15% black variance, each has been balanced for at least 22 years." J.A. XXXIII-16,176. Interestingly, of the seventy-two former white schools that are still open, fifteen are now majority black and were in balance for periods of twelve to twenty-five years. *See* J.A. XXXIII-16,176.

In addition, Dr. Armor examined the seventeen schools in CMS that exceeded the plus fifteen percent variance for three or more years during the last decade. *See* J.A. XXXIII-16,174 76.[4] Sixteen of the seventeen were balanced for periods ranging from nineteen to twenty-six years, with one school experiencing balance for sixteen years. To the extent that CMS's pupil reassignments could be assessed, Dr. Armor concluded that changes instituted by CMS were "attempts to maintain or restore racial balance in the face of overwhelming demographic growth and mobility." J.A. XXXIII-16,176. Indeed, Dr. Armor concluded that imbalance had been reduced in several of the schools because CMS's magnet program attracted white students from the outer reaches of the county.

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[4]Dr. Armor did not include the predominantly white schools in this analysis on three grounds:

> (1) the court order did not establish a minimum percent black enrollment, (2) the half-dozen schools that have had low black enrollment for the past three or more years and that were operating in 1972 have been racially balanced for at least ten years[,] and (3) the demographic analysis of Dr. Clark shows that these schools have become imbalanced or were opened imbalanced because of the substantial white enrollment growth in the outskirts of the county.

J.A. XXXIII-16,174 (footnote omitted); *see also Swann*, 402 U.S. at 26, 91 S.Ct. 1267 (observing "that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law").

Long periods of almost perfect compliance with the court's racial balance guidelines,[5] coupled with some imbalance in the wake of massive demographic shifts, strongly supports the district court's finding that the present levels of imbalance are in no way connected with the de jure segregation once practiced in CMS. *See Freeman,* 503 U.S. at 495, 112 S.Ct. 1430 ("Where resegregation is a product not of state action but of private choices, it does *323 not have constitutional implications."); *Manning,* 244 F.3d at 944 ("Where a [party seeking a finding of unitary status] shows that demographic shifts are a substantial cause of the racial imbalances, [the party] has overcome the presumption of *de jure* segregation."); *United States v. Meriwether County,* 171 F.3d 1333, 1339 (11th Cir.1999) (observing that a "school district need not wage a battle against demographics to achieve perfect racial balance"). The evidence presented at trial adequately explained why a few schools have become imbalanced, and we can discern no evidence or omissions that indicate clear error has been committed in this regard.

2. *Martin* and Unitary Status

The *Swann* plaintiffs also point to school sitings, transportation burdens, and school transfers as evidence that the growing imbalance is caused by state action rather than private choices, and that CMS has not complied with the district court's orders in good faith. In advancing their argument, the *Swann* plaintiffs rely chiefly on *Martin v. Charlotte-Mecklenburg*

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[5]Even the *Swann* plaintiffs admit that ten years after the district court charged the board with taking affirmative steps to desegregate schools, the system "w[as] nearly 100% statistically compliant with the court's orders." Plaintiff Appellants' Brief at 38.

Board of Education, 475 F.Supp. 1318 (W.D.N.C.1979), in which a group of parents sought to enjoin CMS from reassigning over 4000 students in order to maintain racial balance in certain schools. The plaintiffs in *Martin* based their position on *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), and *Regents of the University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). In the former case, the Supreme Court reaffirmed that district courts could not order a school district "to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity," *Spangler,* 427 U.S. at 436, 96 S.Ct. 2697, and in the latter the Court struck down a medical school admissions policy that reserved sixteen of one hundred seats in the entering class for applicants who were " 'economically and/or educationally disadvantaged' " and who were members of certain minority groups, *Bakke,* 438 U.S. at 274, 98 S.Ct. 2733. The district court in *Martin* distinguished *Spangler* by observing that it was but a restatement of the *Swann* Court's admonition about the use of racial quotas and that, unlike Pasadena City, CMS had not achieved racially neutral attendance patterns. *See Martin,* 475 F.Supp. at 1340. As for the *Bakke* decision, the district court pointed out that no student in CMS was denied "an equal educational opportunity" and that the admissions policy in *Bakke* was implemented "against a backdrop devoid of specific judicial findings or administrative acknowledgments of the prior segregated status of the school system." *Id.* at 1345. Accordingly, the *Martin* court concluded that CMS's reassignment of students was "within constitutional limits and should be upheld." *Id.* at 1321. The district court took pains to ensure that its opinion would not be interpreted too broadly: "This order simply upholds the actions of the 1978 Board against the attacks by the plaintiffs." *Id.* at 1347.

In the course of the *Martin* opinion, the district court observed that CMS had fallen short in four areas: construction and location of facilities in parts of the county likely to enhance desegregation, placement of elementary and kindergarten grades in schools throughout the county, monitoring of student transfers so as to prevent resegregation, and allocation of the burdens of busing. *See id.* at 1328- 29. However, the district court also noted that CMS had made great progress and that a return to the old system of segregation "has not tempted the present School Board, who are standing fast in their endeavor to run the schools according to law while providing quality education." *Id.* at 1347.

***324** In *Capacchione,* the district court correctly observed that "*Martin* was not a unitary status hearing," *Capacchione,* 57 F.Supp.2d at 250, and that because "the desegregation plan was still in its fledgling stages, the Court was inclined to keep the pressure on CMS," *id.* at 251. The *Capacchione* court further observed that post-*Martin* changes in Charlotte-Mecklenburg counseled looking at the "concerns [of *Martin*] in a new light." *Id.* The district court's interpretation of *Martin* is reasonable and in accord with the rule in this circuit that a district court, as a continuous institution, is "best able to interpret its own orders." *Vaughns v. Board of Educ.,* 758 F.2d 983, 989 (4th Cir.1985) (school desegregation case). Moreover, the *Martin* order was issued thirteen years before the Supreme Court made clear in *Freeman* that the affirmative measures mandated by *Green* are not meant to remedy "private choices" that lead to resegregation. *Freeman,* 503 U.S. at 495, 112 S.Ct. 1430. The state of the law and the understanding of duties upon school districts were far different when *Martin* was handed down. Hence, a number of assertions in *Martin* cannot be squared with the present state of

the law. *See, e.g., Martin* 475 F.Supp. at 1346 (stating that segregated housing patterns must necessarily lead to the unconstitutional segregation of schools). Ignoring the changes in Charlotte-Mecklenburg and in the law by erecting *Martin* as the framework for unitary status, as the *Swann* plaintiffs urged below, would defy common sense and run afoul of developments in the Supreme Court's school desegregation jurisprudence. *See United States Gypsum Co. v. Schiavo Bros.*, 668 F.2d 172, 176 (3d Cir.1981) (concluding that a successor judge "is empowered to reconsider [the legal conclusions of an unavailable predecessor] to the same extent that his or her predecessor could have"); *see also Meriwether County,* 171 F.3d at 1339 ("The law does not make a school district a prisoner based on factors, such as demographic tendencies, that are beyond its control."). We will examine the district court's *Martin* findings in turn.

a. School Siting

The district court found that CMS had not shirked its duties under the law with regard to school sitings. *See Capacchione,* 57 F.Supp.2d at 251-53. The record reveals that CMS has, to the extent practicable, continually endeavored to site schools in order to foster integration, and has adopted a policy of building schools in areas equally accessible to blacks and whites. Testimony of current board members indicated that in efforts to fulfill this policy, CMS has purchased property in low growth areas for school construction even though schools in predominantly white high growth areas were overcrowded. *See* J.A. V-1986-87. In 1992 CMS reaffirmed its siting policy and resolved that, "whenever possible," new schools would be built in areas that would "provide black student enrollment of not less than 10 percent from the census tracts serving the new

school." J.A. XXXII-15,686. The impetus behind the resolution was growth in the periphery of the county which the board speculated would continue patterns of housing segregation, thus making it more difficult to maintain racial balance in the schools. Evidence presented at trial indicated that the ten percent rule was destined for failure because it was not possible to implement the rule and still "meet the 60-minute bus ride limit." J.A. XXII-10,869. Nevertheless, extensive evidence was presented showing that CMS never sited schools in order to foster segregation and that "every effort was made to try to find school sites that would bring people together in balanced numbers." J.A. VI-*325 2752; *see Meriwether County*, 171 F.3d at 1337 (stating that "the absence of evidence indicating that racial motives played any part in the Board's decisionmaking process" is relevant in accessing compliance with desegregation orders). For example, CMS's executive director of planning and student placement testified that in siting schools CMS "looked at both African-American and all populations not only in the vicinity of the site, but in the entire district." J.A. VII-2920. So dedicated was CMS to siting schools in integrated areas that it contemplated refusing a gift of land for school use because the land was in a predominantly white area. *See* J.A. V- 1985.

Faced with growth in the predominantly white regions of the far south and north, *see* J.A. XXXIII-16,261, CMS was compelled to serve populations in those areas via school sitings. CMS's data show that in the late 1990s, student population was "growing at nearly 4,000 students per year," J.A. XXIX-14,133, and consequently the board was "just trying to keep up" with the population explosion in building schools, J.A. V-2249. Overcrowding was a problem, and in the late 1990s "the average high school expected to operate at 109

percent of its capacity." J.A. XXIX-14,133. Even though CMS was forced to build schools at a rapid rate to serve an expanding student population, pupil assignment plans in which CMS described population growth as a "major consideration [ ]" are replete with efforts to improve racial balance. J.A. XXIX-14,133. For example, the 1997-98 assignment plan highlighted the creation and expansion of several magnet programs specially designed to reduce the black ratio in a number of schools. *See* J.A. XXIX-14,147-51. To the extent practicable, CMS did not sacrifice racial balance concerns to population growth. Though the two often pulled CMS in different directions, the record indicates that the board coordinated racial balance and school sitings as best it could under the circumstances. The evidence does not indicate that the abandonment of the ten percent rule or other decisions regarding school siting were the result of a desire to perpetuate the dual school system or circumvent the district court's orders.

CMS and the *Swann* plaintiffs, citing to prior orders, counter that the board has not done all that it could do in the area of school siting. Erection of such a standard, however, would effectively replace *practicability* with *possibility*. *See Manning*, 244 F.3d at 945 (observing that "the law does not require a defendant school board to take every conceivable step in attempting to desegregate"). The former implies measures that can be reasonably implemented under the circumstances, while the latter omits the reasonableness requirement. For instance, it was possible for CMS to adhere to the ten percent rule while ignoring growth in the far north and south of the county. Youngsters would have been compelled to ride buses for long periods while traveling with the flow of rush hour traffic, but it was nonetheless possible to adhere to the ten

percent rule. Of course, the practicability of a refusal to respond to growth in Charlotte-Mecklenburg is another matter.

In the same vein, the *Swann* plaintiffs contend that school siting decisions were a response to white flight, which is an impermissible reason for failing to comply with a desegregation order. Growth, of course, is far different from flight. And experts offered evidence of "the economic boom in the Charlotte Metropolitan area in the last decade." J.A. XXXIII-16,233. Charlotte- Mecklenburg is one of the most dynamic areas in the South; it is far different from the Charlotte-Mecklenburg of *Swann,* and much changed from that of *Martin.* In ***326** light of the growth in the county and aplethora of evidence demonstrating that the board used its best efforts to site schools in order to foster integration, the district court did not commit error when it concluded that there is no "continuing constitutional violation[ ] in the area of school siting." *Capacchione,* 57 F.Supp.2d at 253.

b. Burdens of Busing

As for the burdens of busing, the district court found that in the most recent school year, 15,533 black students and 11,184 non-black students were bused for balancing purposes. *Id.* As stated earlier, traffic patterns make busing suburban students into the inner city far more difficult than busing inner-city children into the suburbs. *See* J.A. VI-2732; J.A. V-2228. Though a disproportionate number of African-American students are bused, the growth, housing patterns, and traffic patterns support the district court's conclusion that the realities of the current situation should not block a unitary status determination. *See Meriwether County,* 171 F.3d at 1341 (finding no constitutional violation when

white students are "somewhat less burdened by the transportation scheme" because of demographic factors).

c. Student Transfers

Finally, *Martin*'s concern with student transfers appears to have been based on the assumption that CMS would experience average growth. Courts are not omniscient, and the district court in 1979 could not have foreseen the changing demographics that would make student transfers the least of CMS's worries. In the present litigation, the district court observed "that CMS 'kept an eye on [magnet transfers] so that there wouldn't be a run on the bank so to speak from any one school.' " *Capacchione,* 57 F.Supp.2d at 250 n. 10 (alteration in original). This finding is not clearly erroneous, nor can we discern the need for more findings on this issue in light of post-*Martin* changes.

3. Conclusion

In sum, the district court's findings on student assignment are "plausible in light of the record viewed in its entirety." *Anderson,* 470 U.S. at 573, 105 S.Ct. 1504. The dual system of student assignment in CMS has been eradicated "to the extent practicable." *Dowell,* 498 U.S. at 250, 111 S.Ct. 630. The imbalance existing in some schools is not traceable to the former dual system or to renewed discriminatory actions, but rather is a result of growth and shifting demographics. Consequently, we hold that the district court's findings on student assignment are not clearly erroneous.

B. Faculty Assignment

In examining faculty assignment, the district court again used a plus/minus fifteen percent variance. Of the 126 schools operating in CMS, the district court found that in 1997-98 only ten schools were out of balance. The *Swann* plaintiffs point out that this number grew to sixteen in 1998-99, but this means that a mere twelve percent of the schools were out of balance. This is a far cry from the dual system in which "most of the 24,000 [black students] ha [d] no white teachers." *Swann,* 300 F.Supp. at 1360. There is simply no evidence that CMS assigns black teachers to predominantly black schools and white teachers to predominantly white schools. Thus, the district court's conclusion that this *Green* factorhas been satisfied is not clearly erroneous.

C. Facilities and Resources

The *Swann* plaintiffs and CMS contend that the district court impermissibly shifted *327 the burden of proof on this factor. As a result of the alleged error of law, CMS and the *Swann* plaintiffs contend that this issue must be remanded to the district court.

This court has previously made clear that "once a court has found an unlawful dual school system, [those alleging the existence of racial disparities] are entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants." *School Bd. of the City of Richmond v. Baliles,* 829 F.2d 1308, 1311 (4th Cir.1987). In this case, however, the district court noted that none of the prior orders entered in the long history of the *Swann* litigation had ever found racial disparities to exist with regard to school facilities and concluded that CMS and the *Swann* plaintiffs bore the burden of establishing discrimination

with regard to facilities. *See Capacchione*, 57 F.Supp.2d at 263 ("[I]t would defy logic to place now the burden of proof on the Plaintiff Intervenors, requiring them to prove that vestiges of discrimination in facilities have been remedied, when the Court originally found no vestiges to exist."). In our view, this erroneous assignment of the burden of proof, which did not affect the manner in which the parties tried the case or otherwise prejudice their rights, is harmless and does not undermine the district court's factual conclusions regarding the facilities factor.[6]

Immediately after assigning the burden to CMS and the *Swann* plaintiffs, the district court's order nonetheless summarized and weighed the facilities evidence presented by the parties. The district court carefully analyzed the testimony and report of Dr. Dwayne Gardner, an expert witness for CMS. Dr. Gardner analyzed seventy-three schools--every identifiably black school in CMS and a sampling of balanced schools and predominantly white schools. Dr. Gardner measured the adequacy, safety, healthfulness, accessibility, flexibility, efficiency, expansibility, and appearance of the schools. Based on the inspection he grouped schools as follows: "0-44 (suggests replacement), 45-59 (needs major improvement), 60-74 (needs minor improvement), 75-89 (serves program needs), and 90-100 (exceptional quality)." *Id.* at 264. The survey revealed that of the four schools that warranted

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[6]Given the counter-intuitive alignment of the parties in this case, it could be argued that the presumption and burden allocation set forth in *Baliles* should not be applied, and that CMS should instead be required to prove the existence of racial disparity in its facilities. *See United States v. City of Yonkers*, 181 F.3d 301, 309-11 (2d Cir.1999), *vacated on reh'g*, 197 F.3d 41 (2d Cir.1999).

replacement, two were majority white, and two were imbalanced black. *See* J.A. XXV-12,182-86. Thirty-four schools fell into the "needs major improvement" category, of which sixteen were imbalanced black and eighteen identifiably white.

The district court determined that Dr. Gardner's testimony established that any current disparities were functions of the age of the facilities at issue, because

> different building standards apply when a new facility is constructed as compared to when an older facility is renovated or upgraded. In other words, the renovation of an older facility usually complies with the code under which the facility was built. Because most facilities in the predominately black inner city are older while facilities in the predominately white suburbs are newer, the inference is that differences in building standards tend to affect black students disproportionately. This does not amount to racial discrimination. Indeed, ***328** this practice applies regardless of the racial composition of the school. Thus, older schools that are predominately white--several of which were built in the 1920s--are likewise affected by this practice.

Capacchione, 57 F.Supp.2d at 265 (footnote and transcript references omitted). Thus, the district court concluded from Dr. Gardner's testimony and report "that CMS's facilities needs are spread across the system without regard to the racial composition of its schools." *Id.*

The district court also considered the testimony of CMS's assistant superintendent of building services, who

testified that out of 108 schools in need of renovations, eighty-one percent were racially balanced or identifiably white. *See* J.A. VIII-3810 & 3818. The district court concluded that this witness's testimony likewise demonstrated that the deficiencies in CMS's facilities were unrelated to the former de jure system.

Finally, the court considered CMS's track record in renovating old facilities, praising its practice of allocating funds on a per-pupil basis and noting that "CMS has spent a large portion of[its] bond money on improving schools in predominantly black areas." *Capacchione*, 57 F.Supp.2d at 266.

After an extensive discussion of this evidence, the court made the following finding of fact with regard to facilities:

> Just as Judge McMillan found thirty years ago, the Court finds today that inequities in facilities exist throughout the system regardless of the racial makeup of the school. These disparities are generally the result of the relative ages of the facilities, combined with an ongoing lack of funding and the need to accommodate unprecedented growth.

Id.

This finding is clearly determinative of the question of unitary status as to facilities, regardless of which party carried the burden of proof. That is, the district court, after carefully considering and weighing all the evidence presented on this factor, concluded that any disparity as to the condition of the facilities that might exist was not caused by any intentional discrimination by CMS, but instead was a function of the age and location of the facilities and the ever-present problem of

allocating all too scarce funds. Even if the district court had assigned the burden of proof to the plaintiff-intervenors, this factual finding would have compelled a ruling in their favor. In fact, the district court acknowledged as much, stating "that the Plaintiff-Intervenors have proven, to the extent possible, the absence of intent and causation." *Capacchione,* 57 F.Supp.2d at 267 n. 38.[7]

Therefore, because the district court's findings, which were based on the court's weighing of all of the relevant evidence presented at trial, would have yielded the same conclusion under a proper assignment of the burden of proof, any error with regard to the burden of proof is harmless. *See *329Washington State Dep't of Transp. v. Washington Natural Gas Co.,* 59 F.3d 793, 801 (9th Cir.1995) (finding district court's improper assignment of the burden of proof to be harmless because review of the entire record established "that under the proper assignment of the burden of proof, the district court would have reached the same decision"); *Applewood Landscape & Nursery Co. v. Hollingsworth,* 884 F.2d 1502, 1506 (1st Cir.1989) (concluding that, if the district court improperly allocated burden of proof on a particular issue, the

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[7]From this footnote and the district court's detailed discussion about the cause of any disparity in CMS's facilities, it appears that the district court really made alternative rulings on the facilities question: The court first concluded that CMS and the *Swann* plaintiffs bore the burden of proof with regard to facilities and that they failed to carry that burden. *See Capacchione,* 57 F.Supp.2d at 267 ("[T]he *Swann* Plaintiffs have failed to overcome the Court's previous findings on facilities by establishing the requisite discriminatory intent and causation."). The court then ruled in the alternative, as indicated by the footnote and the findings, that the plaintiff-intervenors proved that any disparities were the result of factors unrelated to state action.

error was harmless because the district court's decision on that issue turned on the weight of the evidence in the record and not on burden of proof rules); *cf. Vaughns,* 758 F.2d at 992 (recognizing that an error in shifting the burden of proof in a school desegregation case may be harmless if the record is such that the court can conclude that substantial rights have not been prejudiced).

Because any error associated with the burden of proof is harmless, the only question that remains is whether the district court's factual findings about the facilities are clearly erroneous. Though the evidence could have been weighed differently on this factor, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 470 U.S. at 574, 105 S.Ct. 1504. In 1969, the district court found that there was no constitutional violation in the "quality of school buildings and facilities." *Swann,* 300 F.Supp. at 1372. The *Capacchione* court found that this remains true today, and the evidence as a whole indicates that this finding is not clearly erroneous.

D. Transportation

During the 1998 school year, five out of every six students in CMS rode a school bus. *See Capacchione,* 57 F.Supp.2d at 267. The parties do not dispute the district court's finding that "CMS provides free bus transportation to all students who do not live within a mile and a half of their schools." *Id.* The focus of the *Swann* plaintiffs' argument on this factor deals with the *Martin* opinion. As previously discussed, *Martin* does not provide the framework for a unitary status determination and the district court's interpretation of *Martin,* along with the finding that the present state of busing

"may be about the best CMS can do," *Capacchione*, 57 F.Supp.2d at 253, does not constitute error.

E. Staff Assignment

The district court, noting that findings of discrimination in school staffing were never made, concluded that CMS has complied with its constitutional duties. The parties point this court to no contrary evidence, nor have we discovered such in the record. Therefore, we hold that the district court's findings regarding the fifth *Green* factor are not clearly erroneous.

F. Extracurricular Activities

The district court concluded that there was no discrimination or vestiges of discrimination with regard to extracurricular activities. The evidence presented at trial showed that the ratios of blacks and whites participating in extracurricular activities, though varying somewhat from year to year, is approximately equal. *See* J.A. XXIV-11,634. Areas where there are disparities were not shown to be linked to the former dual system. For example, blacks often outnumber whites in holding elective offices in student government, but whites have a higher level of representation in honors programs. No evidence is found in the record to indicate that CMS somehow pushes African-Americans toward student government and away from honors programs. Consequently, the district court's *330 conclusion that CMS has satisfied this *Green* factor is not clearly erroneous.

G. Ancillary Factors

1. Teacher Quality

The district court found that there was no discrimination in the quality of teaching. The *Swann* plaintiffs contend that this finding is clearly erroneous because students in imbalanced African-American schools are more likely to have inexperienced teachers. This "experience gap," to the extent it exists, is minuscule. The district court found that "teachers in imbalanced- black schools had 0.7 to 1.3 fewer years experience than the district averages and had 1.6 to 2.9 fewer years experience than teachers in imbalanced-white schools." *Capacchione,* 57 F.Supp.2d at 271. To use middle school teachers as an example, the statistics reveal that the average middle school teacher in an imbalanced African-American school had 8.2 years experience versus 9.8 years for his counterpart in an imbalanced white school. *Id.* These numbers clearly support a finding of equality rather than disparity, and cannot undermine the district court's conclusion on this factor.

The district court also pointed to evidence indicating that experience does not necessarily relate to competency. For example, according to former Superintendent Murphy, it is not uncommon to have "excellent first-year teachers" and "very weak 35th-year teachers." J.A. VI-2795. Other witnesses observed that the newer teachers had better "knowledge of various teaching strategies" and were more comfortable with diverse classrooms. J.A. VII-3275.

The *Swann* plaintiffs also assert that imbalanced African-American schools have fewer teachers with advanced degrees. For instance, in imbalanced black high schools only thirty-one percent of the teachers held advanced degrees, while forty-six percent of the teachers in imbalanced white high schools held advanced degrees. *See Capacchione,* 57

F.Supp.2d at 271. As it was with teacher experience, testimony was offered establishing that the number of degrees a teacher possesses does not necessarily translate into competence or quality instruction. *See* J.A. VII-3276. According to former Superintendent Murphy, "the degree level was not a significant indicator of getting better performance on the part of the teacher." J.A. VI-2795. Expert reports submitted by the plaintiff-intervenors also indicated that there is "no significant relationship" between black achievement and teacher education levels. J.A. XXXIII-16,221. In sum, the district court's conclusion that African-American students receive equal access to quality teachers is not clearly erroneous.

2. Student Achievement

The district court found that the existence of an achievement gap between black and white students was not a vestige of the dual system or evidence of discrimination in the current operation of CMS. This was an area of immense disagreement at trial, and the parties presented a mountain of data on this subject. Though the Fourteenth Amendment guarantees equal protection but not equal outcomes, if low African-American achievement is a result of the former de jure system, it must be eliminated to the extent practicable. *See Dowell*, 498 U.S. at 249-50, 111 S.Ct. 630. Conversely, to the extent that low achievement is linked to other factors, it is beyond the reach of the court's authority. Most courts of appeals confronting this issue, including this court, have declined to consider the achievement gap as a vestige of discrimination or as evidence of current discrimination. *See* ***331** *Baliles*, 829 F.2d at 1313 (upholding lower court's findings that low achievement is "primarily attributable to the high incidence of poverty" in the school district); *see also*

United States v. City of Yonkers, 197 F.3d 41, 54 (2d Cir.1999) (observing that "using achievement test scores as a measure, either direct or indirect, of a school system's movement away from segregation is deeply problematic"), *cert. denied,* 529 U.S. 1130, 120 S.Ct. 2005, 146 L.Ed.2d 956 (2000); *People Who Care v. Rockford Bd. of Educ.,* 111 F.3d 528, 537 (7th Cir.1997) (explaining that a number of variables, other than discrimination, account for the achievement gap); *Coalition to Save Our Children,* 90 F.3d at 778 (finding "a causal link between ... socioeconomic factors and student achievement").

The plaintiff-intervenors' expert witness, Dr. Armor, presented evidence indicating that there is no correlation between African-American performance and the racial balance of schools. *See* J.A. XXXIII-16,178. For example, Dr. Armor's studies showed that African-American students in the third through fifth grades attending schools sixteen to twenty-five percent African- American scored the same on standardized tests as their counterparts in schools seventy-five percent black or greater. *See* J.A. at 16,214. Similarly, African-American students in the sixth through eighth grades attending schools sixteen percent black or less scored the same on standardized tests as their counterparts in schools seventy-five percent black or greater. *See* J.A. XXXIII-16,215.

In order to shed light on the true causes of the achievement gap, Dr. Armor turned to socioeconomic factors. The data revealed startling differences between black and white children in CMS.

> Average black family income is $31,000 compared to $59,000 for whites, and only 15 [percent] of black parents are college graduates, compared to 58 percent

> for white parents. A huge poverty gap is also revealed, with 63 percent of black students on free lunch compared to only 9 percent of white students. Finally, 83 percent of white students have both parents at home, compared to only 42 percent for black students.

J.A. XXXIII-16,179. According to Dr. Armor, the socioeconomic factors plus the second grade scores, which are the earliest available, explain "nearly 80 percent of the reading gap and over 70 percent of the math gap." J.A. XXXIII-16,180. Former Superintendent Murphy testified that in his experience "[p]oor students come behind and stay that way. And in Charlotte, a majority of poor students happen to be African-American." J.A. VI-2696. Dan Saltrick, former assistant superintendent for instructional services, also testified that in his experience low student test scores related to parental support which in turn was "a matter of ... socioeconomic levels." J.A. VII-3280. While socioeconomic disparities between black and white pupils are troubling, they are not the result of CMS's actions or inactions and therefore are beyond the scope of the original desegregation order. *See Baliles*, 829 F.2d at 1314 ("Educational deficiencies that result from problems such as poverty are best remedied by programs directed toward eliminating poverty, not by indirect solutions through school programs.").[8] Accordingly, *332 the district

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[8]Despite evidence that the achievement gap results from factors outside CMS's control, the district court found that CMS has undertaken sundry measures to eliminate the gap. For example, CMS adopted financial incentives for teachers and principals tied to student performance, urged black students to take advanced placement and other higher level classes, challenged all students by removing "fluff courses" from the curriculum, provided tutors and other forms of staff support to accelerate student preparedness, and adopted pre-kindergarten programs to accelerate

court did not clearly err in finding that the achievement gap between black and white students is not a vestige of past discrimination or evidence of present discrimination.

3. Student Discipline

The district court found "that any disparities that exist in the area of discipline are not causally related to the dual system." *Capacchione*, 57 F.Supp.2d at 281. In none of the court's prior orders is there any indication that CMS has ever discriminated in meting out punishment for disruptive students. However, recent statistics show that of the 13,206 students disciplined from 1996-98, sixty-six percent were African-American. *See* J.A. XXIV-11,637. As the district court noted, "disparity does not, by itself, constitute discrimination." *Capacchione*, 57 F.Supp.2d at 281. The idea that CMS should have a disciplinary quota is patently absurd, and there is no evidence in the record that CMS targets African-American students for discipline. Instead, the evidence indicates that CMS has adopted guidelines whereby students receive the same level of punishment for certain offenses to ensure that the amount of punishment will not vary from school to school. A student charged with a disciplinary infraction may also appeal the charge "and may assert that the charge was due to racial bias." *Id.* There is simply no evidence in the record that CMS treats African-American students differently in disciplinary matters. Hence, the district court's conclusion that the disciplinary disparities are unrelated to the former de jure system is not clearly erroneous.

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preparedness for the youngest of students. *See Capacchione*, 57 F.Supp.2d at 273-275.

H. Good Faith

Lastly, the district court found that CMS has complied with the desegregation decree in good faith. *See Freeman*, 503 U.S. at 491, 112 S.Ct. 1430 (requiring school board "to demonstrate its good-faith commitment to a constitutional course of action"). Seven factors supported the district court's good-faith finding: (1) no further relief has been sought since the district court removed the case from the active docket in 1975; (2) CMS has gone above and beyond the court's orders by continually striving to achieve balance even when the imbalance was unconnected to the dual system; (3) the board has been open to community input and sought community support for its integrative efforts; (4) the board has repeatedly reaffirmed its commitment to desegregation through various resolutions; (5) African-Americans currently occupy four of the nine seats on the school board, including the chair; (6) the board's actions over the past thirty years do not evince discriminatory motives; and (7) "no evidence has been presented that school authorities were guilty of easily correctable errors." *Capacchione*, 57 F.Supp.2d at 282-83.

Testimony from former board members indicated that the court's order has been "institutionalized," J.A. V-2222, and that the board "always stuck to what the rules were." J.A. V-2234. Former Superintendent Murphy testified that when he arrived in Charlotte-Mecklenburg he found a "unique" environment where "everybody wanted to make sure that their schools were racially balanced." J.A. VI-2686. In 1992, Dr. Stolee suggested a magnet plan to increase integration, and, in the course of his recommendations, observed that "[f]or the last twenty years, the Charlotte-Mecklenburg Board of Education and the Charlotte-Mecklenburg community have, *333 in good

faith, complied with the orders of the court." J.A. XXXII-15,570. He further observed "that the Charlotte-Mecklenburg Board and community have a great deal of pride in the fact that they successfully met a challenge and made the solution work." J.A. XXXII-15,571.

Of course, both in the district court and in appellate arguments, current CMS officials engaged in much self-recrimination and claimed that they had not pursued the dismantlement of the dual system with the requisite zeal. Right on cue, the *Swann* plaintiffs describe this case as "unique" because CMS "has acknowledged its own failure to comply with specific directives" of the district court. *Swann* Plaintiffs' Response to Petition for Rehearing at 10. The district court gave little weight to CMS's assertions that the board had not put forth enough effort, and the evidence presented at trial amply supports the district court in this regard. Former Superintendent Murphy testified that despite a report indicating that CMS was unitary and his belief that CMS "w[as] definitely in compliance," no effort was made to dissolve the court order. J.A. VI-2706. Dr. Murphy gave three reasons for the avoidance of a unitary status hearing. First, he advised board members that the court hearing would be "a long, drawn-out process which would cost millions of dollars, and that would be money taken away from the instructional program." J.A. VI-2706. Second, Dr. Murphy feared that if CMS was declared unitary "we would not be eligible for federal funding for our magnet schools." J.A. VI- 2706; *see also* J.A. XXII-10,563 (CMS report observing that "school districts that intend to use magnet schools for desegregation purposes can apply for grants from the federal government"); J.A. XXI-10,521 (1996-1997 Federal Magnet School Assistance Program Evaluation Report in which CMS describes federal funding as "an integral part" of

its pupil assignment plan). Finally, Dr. Murphy thought it best to remain under court order so CMS could continue to racially balance schools even though the de jure violation had been remedied.

Dr. Susan Purser, the current associate superintendent of education services of CMS, expressed a similar desire for CMS to remain under court order. Though Dr. Purser testified that she believed that the school board, superintendent, and administration were dedicated to enhancing educational opportunities for all of CMS's students regardless of race, she nonetheless expressed a preference for court supervision. Dr. Purser pointed out that the current "Board has only a limited time, because these are elected positions," J.A. XVII-8076, and that over time "superintendents will change, [and] the people involved in [CMS] will change." J.A. XVII-8077. At this point in the cross examination, counsel asked Dr. Purser: "But you don't know what any future School Board or administration will do either way, do you?" J.A. XVII- 8077. Dr. Purser responded: "That's exactly my point." J.A. XVII-8077. Dr. Purser's testimony and that of Dr. Murphy exemplify why the Supreme Court has stressed that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Dowell*, 498 U.S. at 247, 111 S.Ct. 630; *see also Coalition to Save Our Children*, 90 F.3d at 761 n. 6 (warning of "the potential for the entrenchment of [a] putatively transitional desegregation scheme"). The district court's desegregation orders were not intended to continue after CMS remedied the de jure violation, nor were they intended to suspend the democratic process with no prospect of restoration. Yet the orders have been institutionalized to the point that CMS officials cannot imagine life without them. Once a yoke meant to steer *334 CMS towards compliance with the Constitution,

the orders are now used by CMS officials as mechanisms for the attainment of different goals. In truth, CMS officials have little desire for a unitary status determination and are struggling to keep the orders firmly in place.

Ironically, CMS's clinging to the temporary desegregation orders buttresses the district court's finding that it is unlikely "CMS would return to an intentionally-segregative system." *Capacchione*, 57 F.Supp.2d at 284. If CMS will go to such lengths to keep the court's orders in place so that it may continue racial balancing and other policies, it is unthinkable that CMS will attempt to revive the dual system. Accordingly, the district judge's finding of good faith is not clearly erroneous.

I. CMS's Remedial Plan

As a response to the plaintiff-intervenors' push for unitary status, CMS developed a "remedial plan" addressing many of the *Green* factors and other ancillary factors. *See* J.A. XXIII-11,028. The district court dismissed the remedial plan as a " 'litigation strategy' plan" and declined to consider it. *Capacchione*, 57 F.Supp.2d at 256. CMS and the *Swann* plaintiffs characterize the district court's treatment of the remedial plan as a fundamental error of law that requires reversal of the unitary status determination. First, CMS and the *Swann* plaintiffs aver that the district court misconstrued the test for unitary status. Adopting the test crafted by the panel opinion, CMS and the *Swann* plaintiffs assert that a district court must consider (1) what a school district has done, and (2) what a school district may do in the future. *See Belk*, 233 F.3d at 252-53. Because the district court did not undertake the latter inquiry as to the remedial plan, CMS and the *Swann*

plaintiffs argue that the district court's order must be reversed. This proffered two-part test is divined from Supreme Court cases which have instructed district courts to ask "whether the Board ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Dowell,* 498 U.S. at 249-50, 111 S.Ct. 630; *see also Freeman,* 503 U.S. at 491, 112 S.Ct. 1430.

While we agree with the first prong of the test, we do not agree that examining "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable," *Dowell,* 498 U.S. at 249-50, 111 S.Ct. 630, requires a district court--as a matter of law--to consider a remedial plan conceived, drafted, and offered by one of the parties during the lawsuit as an obvious defense to it. The plain meaning of the relevant language is that in some desegregation cases simple compliance with the court's orders is not enough for meaningful desegregation to take place. *See Swann,* 402 U.S. at 25, 91 S.Ct. 1267 (stating that "a district court's remedial decree is to be judged by its effectiveness"). For example, a decree entered in the 1960s or 1970s could have underestimated the extent of the remedy required, or changes in the school district could have rendered the decree obsolete. In either case, a district court must look beyond mere compliance with the original decree and ask whether the vestiges of the dual system have been eliminated to the extent practicable. In the present case, the district court undertook such an inquiry. Not only did the district court address compliance, but it also looked beyond the original decree and examined how the extensive changes in the Charlotte-Mecklenburg area have affected the dismantling of the former dual system. Hence, the district court was not

required under *Dowell* and ***335** *Freeman* to have considered CMS's eleventh-hour remedial plan.

Likewise, the district court did not run afoul of Federal Rule of Evidence 402 when it refused to consider the remedial plan. Rule 402, of course, declares that "[a]ll relevant evidence is admissible." Fed.R.Evid. 402. Even relevant evidence may be excluded, however, when its probative value is substantially outweighed by considerations of the needless presentation of cumulative evidence. *See* Fed.R.Evid. 403. And CMS's remedial plan was certainly cumulative, citing and summarizing several expert reports which had been admitted into evidence. For example, the plan's discussion of faculty assignment is based on the reports of Dr. William Trent, Dr. Robert Peterkin, and Dr. Roslyn Mickelson; the plan's discussion of facilities is based on Dr. Gardner's report; the plan's discussion of the achievement gap between blacks and whites is based on the reports of Dr. Trent, Dr. Peterkin, and Dr. Mickelson; and the plan's student assignment discussion is based on Dr. Gordon Foster's report. All of the aforementioned reports were admitted into evidence and the authors of the reports testified at the hearing and were subject to cross-examination. Hence, much of the remedial plan was cumulative, providing the district court with but a rehashing of expert reports and testimony.

To the extent that the remedial plan contained relevant evidence appearing nowhere else in the record, we hold that the exclusion of such evidence was harmless. According to Federal Rule of Civil Procedure 61, a "court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Listing myriad deficiencies, objectives, and strategies,

the thirty-one page remedial plan is often short on specifics. Considering the amount of evidence presented on every aspect of CMS's operations during other phases of the two- month bench trial, we cannot hold that the exclusion of the remedial plan affected CMS's substantial rights. *See Ingram Coal Co. v. Mower, L.P.*, 892 F.2d 363, 366 (4th Cir.1989) (applying Rule 61). Because the exclusion of the remedial plan in no way renders the judgment below suspect, the district court's treatment of the plan cannot support reversal.

J. Conclusion

Pursuant to the foregoing, we affirm the district court's unitary status determination in toto. The district court's findings on the *Green* factors and the ancillary factors are bereft of clear error and we cannot discern any error of law affecting the substantial rights of the parties. After more than three decades of federal court supervision, CMS has complied in good faith with the mandate of *Brown* embodied in the district court's desegregation orders to achieve a unitary school system. The dual system has been dismantled and the vestiges of prior discrimination have been eliminated to the extent practicable.

This is not to say that CMS is a perfect school system--it is not. Like school systems across the nation, CMS faces an expanding pupil population, aging facilities, and a scarcity of funds. These difficulties, however, are not vestiges of the former de jure system and therefore do not have constitutional implications. Considering CMS's exemplary efforts in eradicating the segregated school system, we are confident that de jure segregation is history.

III. Magnet Schools

I turn now to Capacchione's challenge to CMS's 1992 magnet schools plan. Specifically, Capacchione contends that his daughter Cristina was unconstitutionally ***336** denied admission to a magnet school program on account of her race. Capacchione does not argue that race should not have been a factor in the magnet admissions process, but that the inflexible quotas, which operated to leave seats in these specialized schools vacant despite long waiting lists, went beyond what was permissible under prior court orders and the Constitution.

As noted previously, CMS operated its schools in nearly perfect racial balance for almost twenty years under a pupil assignment plan, adopted by the board and approved by the district court in 1974, which primarily utilized paired elementary schools, satellite attendance zones, a feeder system, and three experimental "optional schools." *See Swann,* 379 F.Supp. at 1103-05; J.A. XXVIII-13,536-44. In 1991, however, CMS hired Dr. Stolee to examine racial imbalance that was being caused anew by the demographic shifts and population growth in Mecklenburg County. The result of Dr. Stolee's labors was a new pupil assignment plan, entitled "CMS Student Assignment Plan: A New Generation of Excellence." This new plan emphasized the use of magnet schools, which would allow CMS to phase out the unpopular paired elementary schools. Magnet schools, many of which were located in predominately black neighborhoods, offered a specialized curriculum or innovative instructional styles not found in the other schools in the system.

Former Superintendent Murphy oversaw implementation of the Stolee plan and testified that the magnet

program was adopted because CMS "wanted to attract more white youngsters into the inner city schools" in order to meet CMS's racial-balance goals. J.A. VI-2709. Dr. Stolee observed in his report that "Charlotte-Mecklenburg has had a long and successful experience with mandatory school assignments," but that in order to combat demographic shifts CMS should adopt a plan based on voluntarism. J.A. XXXII-15,581; *see also Missouri v. Jenkins*, 515 U.S. 70, 92, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (*Jenkins III*) ("Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis, without requiring extensive busing and redrawing of district boundary lines."); J.A. XXVIII-13,796 (student assignment plan boasting that "Charlotte, the city which prides itself on leading the nation in integration through busing, now has the opportunity to become the city to lead the nation in voluntary busing"). A desegregation plan using magnet schools, according to Dr. Stolee, would "give[ ] each parent an opportunity to make a choice between a school serving the area in which the family resides, a school in some other area, or a school offering a very specific attractive program." J.A. XXXII- 15,580. Dr. Stolee also recognized that the magnet-centered plan would be a dramatic shift from the prior desegregation plan which featured paired elementary schools, satellite attendance zones, and a feeder system. Thus, as part of the plan, he recommended that CMS secure approval from the district court before making any changes. Indeed, Dr. Stolee's "RECOMMENDATION # 1," out of forty-four, read:

> THE SCHOOL BOARD, THROUGH LEGAL COUNSEL, SHOULD APPROACH THE FEDERAL COURT TO SECURE APPROVAL TO CHANGE THE COURT-ORDERED DESEGREGATION PLAN.

J.A. XXXII-15,578. This recommendation was consistent with the prior district court order directing CMS to apply to the district court "before making any material departure" from the approved desegregation plan. *Swann*, 311 F.Supp. at 270; *see* ***337** *also* J.A. XXVIII-13,790 (board member requesting that Dr. Stolee "review the federal court order" to determine if the magnet plan was permissible). However, CMS ignored Dr. Stolee's advice and the district court's instruction, choosing instead to withhold these changes in the desegregation plan from the district court.

The crux of the problem with CMS's magnet school plan is its admissions process. As aptly described by the district court, it operates as follows:

> At the start of the process, CMS first fills seats with preferences based on whether the applicant lives in close proximity to the school and whether the applicant has any siblings in the school. CMS then fills the remaining seats by selecting students from a black lottery and a non-black lottery until the precise racial balance is achieved.

Capacchione, 57 F.Supp.2d at 287 (internal citations omitted). As originally explained to the board, the plan sought a balance of sixty percent white and forty percent black in the magnet schools with a plus or minus fifteen percent deviation. *See* J.A. XXVIII-13,705. Unfortunately, CMS opted for a strict ratio of sixty percent white and forty percent black, and decreed in its 1992 student assignment plan that magnet "slots reserved for one race will not be filled by students of another race." J.A. XXXII-15,702. The result of this policy was that if a sufficient number of blacks or whites did not apply and fill the seats

allotted to their respective races, then those seats would be left vacant. Though some exceptions were made, Superintendent Eric Smith testified that CMS generally adhered to the policy. *See* J.A. XV-7217.

The district court appropriately examined the magnet schools through a pre-unitary status lens, observing "that the current litigation started not as a petition for unitary status but as a discrimination suit arising out of Cristina Capacchione's denial of admission to a magnet school based on her race." *Capacchione*, 57 F.Supp.2d at 284. The district court recognized that school officials acting pursuant to a desegregation order were immune from liability for actions taken consistent with that order. *See Fowler v. Alexander*, 478 F.2d 694, 696 (4th Cir.1973) (law enforcement officials who confined the plaintiff pursuant to a court order were immune from § 1983 suit); *see also Wolfe v. City of Pittsburgh*, 140 F.3d 236, 240 (3d Cir.1998) (officials acting pursuant to court order establishing quotas for promotions are not subject to § 1983 liability); *Turney v. O'Toole*, 898 F.2d 1470, 1472-73 (10th Cir.1990) (holding that so long as a court order is facially valid, officials acting pursuant to that order are immune from a damages suit); *Coverdell v. Department of Soc. & Health Servs.*, 834 F.2d 758, 764 (9th Cir.1987) (social worker is immune from § 1983 liability when executing a facially valid court order). However, the district court concluded that the use of magnet schools had never been approved and that the rigid racial limitations of the magnet admissions policy were "beyond the scope of the Court's mandate." *Capacchione*, 57 F.Supp.2d at 285. The district court then subjected the admissions policy to strict scrutiny, holding that the policy violated the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly tailored to achieve the

compelling state interest of remedying past discrimination. This court reviews the district court's findings of fact for clear error and its legal conclusions de novo. *See Rutherford Hosp., Inc. v. RNH Partnership,* 168 F.3d 693, 698 (4th Cir.1999).

A. Immunity

I begin with the question of whether CMS officials are entitled to immunity because ***338** their actions in adopting and implementing the Stolee magnet program in 1992 were taken pursuant to and were consistent with the desegregation orders and opinions issued by the district court and Supreme Court in the early 1970s. In the main, CMS asserts that it is entitled to immunity for its act of implementing the 1992 magnet schools program without court approval because the prior desegregation orders authorized the use of "optional schools" and a racial balance goal for filling them. Like the district court, I conclude that the magnet schools plan, as implemented, was not authorized by the prior court orders and that, for the reasons stated hereafter, the CMS officials are not entitled to immunity.

1. Magnet-Centered Program

As an initial matter, I note that prior court orders did not countenance implementation of a desegregation plan based primarily on magnet schools. Never was CMS given carte blanche to adopt such a program absent court review and approval. CMS counters that a magnet-centered plan was permissible insofar as the district court approved the establishment of a few experimental optional schools in 1974 as part of a plan utilizing paired elementary schools, satellite attendance zones, and a feeder system. *See Swann,* 379 F.Supp. at 1103-04. What CMS fails to recognize is that optional

schools were but a small part of the plan approved in 1974, likely because the district court was very skeptical about their efficacy as a desegregation technique. In the course of its order, the district court noted that the history of optional schools was marked by "failure" in a number of regards and warned CMS to be cautious in creating them. *Id.* at 1103. Consequently, CMS began with three experimental optional schools in 1974 and increased the number to only six by the early 1990s.

The optional schools created in the wake of the 1974 order placed more "emphasis on open or traditional education than normally offered in conventional schools." J.A. XXXII-15,683. The optional schools' traditional programs "offer[ed] an enriched and highly structured education," J.A. XXXII- 15,732, whereas the open programs offered a "student-centered" environment that "encouraged [students] to take responsibility for their behavior and for their own learning." J.A. XXXII-15,733. The optional schools approved by the 1974 order were not as diverse and specialized as the magnet school program implemented in 1992. The program suggested by Dr. Stolee offered schools specializing in traditional and open educational methods and created specialized schools featuring the Montessori method; science, mathematics, and technology; foreign language immersion; learning immersion programs for young children; enhanced education for academically gifted students; and communication studies programs. *See* J.A. XXXII-15730-41. However, both the optional schools and the magnet schools were designed to achieve the same end result--the attraction of students to a school in a particular location by using a specialized curriculum or teaching technique. Thus, Dr. Stolee, in recommending the magnet program in 1992, observed that CMS, via its optional

schools, "had some experience in such specialized schools." J.A. XXXII-15,580.

Despite the district court's 1970 directive that CMS obtain court approval for material modifications to the court-imposed desegregation plan, the court's skepticism of optional schools, the approval process that took place in the ensuing years, and Dr. Stolee's specific recommendation in 1992 that CMS seek court approval for the new magnet schools program, CMS inexplicably chose not to return ***339** to the district court to obtain approval of the magnet schools plan. At appellate argument before the entire court, CMS contended that the language in the 1970 order requiring court approval for material departures was superceded by the 1974 order. CMS points to no language in the 1974 order supporting this argument and its repeated citations to and reliance on pre 1974 orders regarding other aspects of this case further call into doubt this new line of argument. Moreover, the 1974 order made clear that "[e]xcept as modified herein, *all previous orders of court remain in effect.*" *Swann,* 379 F.Supp. at 1105 (emphasis added). Hence, the 1970 order's requirement that CMS obtain leave of court "before making any material departure from any specific requirement set out in the order" remained binding on school officials. *Swann,* 311 F.Supp. at 270.

Nevertheless, I recognize that magnet schools are frequently used by school districts under a desegregation order, *see Milliken v. Bradley,* 433 U.S. 267, 272, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (*Milliken II*) (approving of magnet schools as a desegregation tool), and that the district court "encouraged [CMS officials] to use their full 'know-how' and resources to attain" a desegregated school system, *Swann,* 311 F.Supp. at

269. Indeed, the plaintiff-intervenors' own expert has touted magnet programs as an "effective way to attract sizable numbers of white students to predominately minority schools." David J. Armor, *Forced Justice: School Desegregation and the Law* 223 (1995). Thus, a magnet schools program, properly implemented, can no doubt be an effective desegregation tool. However, a conclusion that CMS was free to adopt any form of magnet school program it might wish to see in place does not flow from this general proposition.

I must forcefully disagree with CMS's contention that the mention of optional schools in the 1974 order provided legal cover for the implementation of an assignment plan depending almost entirely on magnet schools. The portions of the district court order authorizing "optional schools" could perhaps be read in isolation as authorizing CMS's use of "magnet schools" in more diverse, specialized areas, but the order did not authorize CMS to unilaterally abandon pairing, satellites, and feeders in exchange for a magnet-centered plan. Despite the import of the 1974 order, and without even a nod to the district court, CMS in 1992 abandoned the approved desegregation plan in favor of magnets. By the end of the decade CMS had created fifty-eight magnet programs--a far cry from the six optional schools in operation in the school year just prior to the adoption of the Stolee plan. *See* J.A. XXXIV-16,721-30. CMS describes this abandonment of the prior plan as but an expansion of the approved use of optional schools. Clearly, this "expansion" was in reality a substantial restructuring and cannot be squared with the unambiguous directives of prior orders.

2. Strict Ratios

Even if I could conclude that a magnet-centered plan was permitted under prior court orders, the plan implemented by CMS is nonetheless *ultra vires* because it combines a rigid ratio of sixty percent white and forty percent black with a policy decreeing that "slots reserved for one race will not be filled by students of another race." J.A. XXXII-15,702.[9] In 1970, the ***340** district court issued a desegregation order to CMS, noting that the order was "not based upon any *requirement* of 'racial balance.' " *Swann,* 311 F.Supp. at 267 (emphasis added). The court reiterated "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but ... that variations from the norm may be unavoidable." *Id.* at 267-68 (internal quotation marks omitted). On appeal, the Supreme Court affirmed the guidelines set forth in the district court's order and also addressed the subject of racial quotas. *See Swann,* 402 U.S. at 23-25, 91 S.Ct. 1267.

With regard to the district court's goal of achieving a racial balance of seventy-one percent white and twenty-nine percent black, the Court took care to note that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the

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[9]My colleagues in the majority on this issue eloquently argue that CMS was permitted to take race-conscious measures when complying with desegregation orders. With this I agree--a school district under order to desegregate must of course take race into account when assigning students. The primary question regarding the magnet program, however, is whether CMS ran afoul of the Supreme Court's prohibitions against inflexible ratios, not whether race-conscious measures are permissible.

racial composition of the school system as a whole." *Swann,* 402 U.S. at 24, 91 S.Ct. 1267. But central to the issue now before us, the Court held that had the district court

> require[d], as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

Id. See also Winston-Salem/Forsyth County Bd. of Educ. v. Scott, 404 U.S. 1221, 1227, 92 S.Ct. 1236, 31 L.Ed.2d 441 (1971) (Burger, C.J., in chambers) (describing as "disturbing" the school board's "understanding that it was *required* to achieve a fixed 'racial balance' that reflected the total composition of the school district"). The goal was upheld, only upon the condition that "use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." *Swann,* 402 U.S. at 25, 91 S.Ct. 1267.

Just two years after the Supreme Court, in this very case, made clear that strict ratios were unacceptable, the district court, in a carefully worded order permitting CMS to create optional schools, approved an intentionally flexible enrollment formula of "*about or above* 20% black students." *Swann,* 379 F.Supp. at 1104 (emphasis added). The district court recognized that the "actual enrollment of the optional school may have to be guided by its racial composition and by the number drawn from each other school area, not by considerations of space and program only." *Id.* at 1108. Additionally, the district court's order directed that "[r]eassignments to optional schools must not jeopardize the racial composition of any other school." *Id.* These

modifications, however, at no time set a racial ratio of the type disapproved of by the district court in its earlier orders and by the Supreme Court in its 1971 review of the district court's 1970 order.[10]

***341** CMS asserts that the inflexible racial limits adopted in the 1992 magnet-centered plan were countenanced by the 1974 order discussing optional schools.[11] In making this

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[10]I also disagree with the assertion that the Supreme Court's disapproval of inflexible racial quotas as a desegregation tool is solely a limitation on a district court's remedial power. While the *Swann* Court did imply that a school board, exercising its discretion, could "conclude ... that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole," 402 U.S. at 16, 91 S.Ct. 1267, this is certainly not the state of the law today nor was it the state of the law in 1992when the magnet plan was adopted. At the very least, the Supreme Court decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 283, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion applying strict scrutiny to a school board's race-based layoff program), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (applying strict scrutiny to a racial set-aside program), should have alerted CMS that it could not rely on the "pluralistic society" passage from the 1971 opinion when crafting a magnet admissions policy that was outside the scope of the desegregation orders. By 1992 such a use of race was not merely discretionary. Prevailing case law required that the racial classification be narrowly tailored to achieve a compelling state interest. *See J.A. Croson Co.*, 488 U.S. at 494, 109 S.Ct. 706. And as demonstrated in section III.B, the admissions policy was in no sense narrowly tailored.

[11]In contending that rigid ratios were not used by CMS, several of my colleagues observe that not a single magnet school achieved the precise ratio of sixty percent white students and forty percent black students. This is not surprising insofar as the policy was designed to leave seats vacant. The very act of leaving seats vacant will compel a deviation from the stated

argument, CMS ignores the district court's choice of words in the 1974 order ("about or above 20% black students"), *see Swann*, 379 F.Supp. at 1104, and points to an attachment to the order designated as Exhibit A. This exhibit, a proposed pupil assignment plan drafted by CMS and a citizens advisory group, called for optional school enrollment "at or above *approximately* a 20% black ratio." *Id.* at 1108 (emphasis added). From this language, CMS concludes that strict quotas were permitted. CMS's concentration on just a portion of the relevant language ("at or above") edits out the word "approximately," which does not suggest rigidity. Even if Exhibit A could be read as requiring rigid quotas, CMS disregards the fact that the district court approved the guidelines "subject to the further conditions stated" in the 1974 order. *Id.* at 1103. With the Supreme Court's admonition about strict quotas in mind, the district court chose its language carefully, observing that optional schools should "have about or above 20% black students." *Id.* at 1104. Hence, it is the district court's understanding and modification of the pupil assignment plan that controls, not CMS's tortured reading. Under a just construction, it is clear that the 1974 order did not approve a use of race to the extent that CMS could deny eager applicants an otherwise available slot in a magnet program solely on account of the applicant's race. Both the district court and the Supreme Court in this very case consistently rejected the use of such rigid racial quotas.

I also find no authorization for the board's adoption of the magnet schools program in the Supreme Court's 1971 approval in *Swann* of a majority-to- minority transfer policy

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goal. However, this in no way undermines a finding of rigidity. Instead, such a result illustrates the policy's inflexibility.

that would prevent, for example, an African-American child in a majority white school from transferring to a majority black school because the transfer would increase the degree of segregation in the affected schools. *See Swann*, 402 U.S. at 26, 91 S.Ct. 1267. Because the majority-to-minority transfer policy, like the magnet admissions policy, prevents a child from enrolling in the public school of his choice, CMS argues that the magnet admissions policy is permissible. By definition, however, CMS's specialized magnet programs are not tantamount to conventional public schools. While a child denied a transfer from one conventional school to another still receives the same general education, a child denied admission to a specialized magnet program does not receive ***342** a similar benefit in a conventional school. In other words, an education in a magnet school offering, for example, foreign language immersion, is not interchangeable with an education in a conventional public school.[12] Hence, the effect of the magnet admissions policy is far different from the majority-to-minority transfer policy.

Unfortunately, the end result of the challenged magnet schools admissions policy is placement of racial quotas ahead of educating students--an inappropriate result nowhere countenanced in the district court's orders or in the Supreme

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[12]I recognize that parents might perceive that one "fungible" conventional school is superior to another because of a number of intangibles such as the reputation of teachers or the newness of facilities. However, these "personal preferences" do not rise to a level of constitutional significance. *See Hampton v. Jefferson County Bd. of Educ.*, 102 F.Supp.2d 358, 380 n. 43 (W.D.Ky.2000). Magnet schools, on the other hand, are a completely different animal and therefore the admissions process used must be more closely scrutinized.

Court's desegregation decisions. *Cf. Wright v. Council of the City of Emporia,* 407 U.S. 451, 463, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972) (holding that courts should not approve a desegregation plan if the plan offers " 'quality education' to some children, [but] has a substantial adverse effect upon the quality of education available to others"). In fact, *Brown I* struck down segregated schooling because children were denied equal educational opportunities. *See Brown I,* 347 U.S. at 493, 74 S.Ct. 686. While school boards were permitted to use race in assigning students in order to convert to a unitary system, *see North Carolina State Bd. of Educ. v. Swann,* 402 U.S. 43, 46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) (holding that the use of race in pupil assignments is "one tool absolutely essential to fulfillment of [a school board's] constitutional obligation to eliminate existing dual school systems"), neither the *Brown* opinions nor the district court orders implementing them ever contemplated that remedial use of race, like the old dual system, would deny some students educational opportunities solely because of their race. *See Brown I,* 347 U.S. at 493, 74 S.Ct. 686 (holding that an educational opportunity provided by the state "must be made available to all on equal terms"); *see also Bakke,* 438 U.S. at 305, 98 S.Ct. 2733 (Powell, J.) ("When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.").[13] Indeed, in bringing suit in 1965, the *Swann* plaintiffs, in accord with the

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[13]Though the present case was brought on behalf of a white child denied admission to a magnet school, the policy as written could have just as easily denied a black child admission to the magnet school. *See Hampton v. Jefferson County Bd. of Educ.,* 102 F.Supp.2d 358, 377 (W.D.Ky.2000) (racial quota in a magnet school resulting in black students being denied admission even though the school was several hundred students below capacity).

Brown opinions, simply asked that CMS convert "into a unitary nonracial system wherein the educational opportunities offered by [CMS] are made available to students without regard to race or color." J.A. XXXIII-16,162 (original complaint filed by the *Swann* plaintiffs).

An admissions policy that uses rigid racial quotas to deny an available, unclaimed slot in a specialized magnet school to a child, whether black or white, on account of the child's race cannot be squared with the district court's orders or the Supreme Court's desegregation decisions. Since 1971 it has been perfectly clear that mathematical ratios may be used as "a starting point in the process of shaping a remedy," ***343** but not as "an inflexible requirement." *See Swann,* 402 U.S. at 25, 91 S.Ct. 1267. The district court took heed of this admonition in 1974 when it permitted the creation of optional schools with "*about or above* 20% black students." *Swann,* 379 F.Supp. at 1104 (emphasis added). However, CMS in 1992 ran afoul of the rule announced by the Supreme Court when it crafted strict racial ratios designed to leave open magnet school seats empty, rather than permitting waitlisted students to compete for the slots. Because nothing short of intellectual gymnastics can transform the clear meaning of the Supreme Court's *Swann* opinion or the district court's 1974 order into vehicles countenancing the rigid use of racial ratios, I agree with the district court that the policy is *ultra vires* and that CMS officials are not entitled to immunity.

B. Equal Protection

Having determined that the CMS officials are not entitled to immunity for the implementation of the strict race-based magnet school assignment policy, I now turn to the

question of whether the officials' act of implementing the policy without prior court approval, albeit while under an order to desegregate schools, runs afoul of the Equal Protection clause. I would hold that it does.

Under the Fourteenth Amendment, "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. By guaranteeing equal protection, the Amendment recognizes that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). The Supreme Court has refused to make exceptions for so-called "benign" racial classifications, *see Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), and the Court has made clear that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," *id.*[14]

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[14]The Supreme Court's application of strict scrutiny has indeed been unwavering. In *Adarand,* the Court refused to apply a lesser standard of scrutiny to racial classifications enacted by Congress. Though Congress itself is charged with enforcing the Fourteenth Amendment's promise of equal protection via "appropriate legislation," U.S. Const. amend. XIV, § 5, the Supreme Court in interpreting the Fifth Amendment held Congress to the same rigorous standards applicable to states and localities. *See Adarand,* 515 U.S. at 224, 115 S.Ct. 2097 (observing "that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

CMS and the *Swann* plaintiffs contend that strict scrutiny does not apply when a school district is under court order to dismantle the dual

***344** [19] To survive strict scrutiny, CMS's use of race in the magnet admissions program "must (1) serve a compelling governmental interest and (2) be narrowly tailored to achieve that interest." *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (4th Cir.1999), *cert. dismissed*, 529 U.S. 1050, 120 S.Ct. 1552, 146 L.Ed.2d 364 (2000). CMS avers that the magnetadmissions policy was adopted to remedy the effects of the dual school system previously operated in Mecklenburg County. Without question, remedying the effects of past discrimination is a compelling state interest. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

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system. Such an approach, however, ignores two of the three pillars of Supreme Court's equal protection analysis: skepticism of all racial preferences and consistent application of heightened scrutiny regardless of the race of the person burdened or benefitted. *See Adarand*, 515 U.S. at 223-24, 115 S.Ct. 2097. Contrary to the assertions of CMS and the *Swann* plaintiffs, the approach I would adopt does not deprive a school board under court order of the necessary tools required to establish a unitary school system.

The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking.... Strict scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable"; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. *Id.* at 228, 115 S.Ct. 2097 (internal citations omitted) (alteration in original). This careful evaluation demanded by the Supreme Court will preserve inviolate proper desegregation remedies while ensuring that in the process of desegregating a government actor does not stand equal protection on its head by denying some students educational opportunities solely because of their race.

In reviewing whether a policy is narrowly tailored to serve a compelling state interest, a court considers factors such as:

(1) the necessity of the policy and the efficacy of alternative race neutral policies;

(2) the planned duration of the policy;

(3) the relationship between the numerical goal and the percentage of minority group members in the relevant population;

(4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and

(5) the burden of the policy on innocent third parties.

See United States v. Paradise, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality opinion). Like the district court, I would hold that the CMS magnet admissions policy is not narrowly tailored to the compelling interest of remedying past discrimination.

First, the magnet admissions policy was not necessary to comply with the court's order to dismantle the dual educational system. CMS had a number of options available to it that would not have deprived children, solely on account of their race, an available seat in a specialized magnet program. Instead, CMS opted for rigid racial limits that were clearly prohibited by the district court's orders and the Supreme Court's desegregation decisions. Nor is there evidence in the record that added flexibility or a waiver provision would have

undermined the use of magnet schools as a desegregation technique. The evidence simply does not reveal that the magnet admissions policy used was the only efficacious option available to CMS.

Second, this circuit has emphasized that "[t]he use of racial preferences must be limited so that they do not outlast their need; they may not take on a life of their own." *Hayes v. North State Law Enforcement Ass'n,* 10 F.3d 207, 216 (4th Cir.1993) (internal quotation marks omitted). Like the district court, I can find "no mention of the duration that CMS would use racially segregated lotteries, vacancies, and waiting lists." *Capacchione,* 57 F.Supp.2d at 290. In light of CMS's desire to remain under court order for the indefinite future, *see supra* Part II.H, the lack of a duration for the magnet admissions policy is not surprising. CMS was apparently content, in a number of instances, to leave available magnet seats empty despite the waiting lists.

***345** Third, I agree with the district court that "the 60-40 numerical goal is related to the relevant population, i.e., the racial composition of schoolchildren in CMS." *Capacchione,* 57 F.Supp.2d at 289. However, there is no evidence that CMS considered the "practicability of achieving this precise ratio in every magnet school," *id.* at 290, or the very real danger that magnet schools would be underutilized because seats would be left open despite an abundance of applicants. The result of the admissions policy is but another indication that the CMS administration, in the words of former Superintendent Murphy, "was more focused on balance than on [educational] outcomes." J.A. VI- 2687.

Fourth, the district court aptly described the inflexibility in the magnet admissions policy: "The Court is hard-pressed to find a more restrictive means of using race than a process that results in holding seats vacant while long waiting lists full of eager applicants are virtually ignored." *Capacchione,* 57 F.Supp.2d at 289. The policy is indeed "restrictive," but it also borders on obduracy. The policy contained no written waiver provision which, once again, shows a lack of concern that these highly specialized schools could and would be underutilized.

Finally, the innocent parties affected are children denied magnet slots solely because of their race and parents who "must wait for months without knowing where their children eventually will be placed." *Id.* at 290. A child's education is one of the greatest concerns of the family, and CMS unnecessarily causes much agonizing when it places children of the "wrong color" on waiting lists while it actively recruits children of the "right color" to fill empty magnet school seats.

In sum, the magnet admissions policy is not narrowly tailored. The policy is not necessary to dismantle the de jure system, is for an unlimited duration, provides for virtually no flexibility, and burdens innocent children and their families. The policy quixotically purports to establish equal protection of the laws in the realm of public education by denying children an equal opportunity to compete for open, unclaimed slots in CMS's extraordinary magnet schools. The withholding of seats from white students after all African- American children wishing seats have been given them is most certainly not a narrowly tailored program. Such a result calls to mind why strict scrutiny is used in the first place: "Of all the criteria by which men and women can be judged, the most pernicious is that of race." *Maryland Troopers Ass'n v. Evans,* 993 F.2d

1072, 1076 (4th Cir.1993). Teaching young children that admission to a specialized academic program with available seats is contingent on their race is indeed pernicious, and CMS's magnet admissions policy can in no way be described as narrowly tailored to achieve the compelling interest of remedying past discrimination.[15]

C. Award of Nominal Damages

After finding a constitutional violation in the magnet schools, the district court held ***346** CMS "nominally liable in the amount of one dollar." *Capacchione,* 57 F.Supp.2d at 290. CMS argues that the nominal damages awarded were unjustified because the actions resulting in a constitutional violation were taken in good faith. CMS fears that the damages award will "open the door to numerous suits by other students who could claim that they did suffer actual damages and argue that collateral estoppel prevents CMS from denying liability." Defendants-Appellants' Brief at 24. Regarding nominal damages, the Supreme Court has observed:

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[15]CMS also presented diversity as an alternative compelling state interest. *See Capacchione,* 57 F.Supp.2d at 289. In this circuit, it is unsettled whether diversity may be a compelling state interest. *See Eisenberg v. Montgomery County Pub. Schs.,* 197 F.3d 123, 130 (4th Cir.1999), *cert. denied,* 529 U.S. 1019, 120 S.Ct. 1420, 146 L.Ed.2d 312 (2000). Assuming without deciding whether diversity may be a compelling state interest, I would hold that the magnet admissions policy again fails because it is not narrowly tailored. Whether the interest is remedying past discrimination or diversity, the admissions policy as currently written is in no sense narrow. It is difficult to imagine any interest for which the magnet admissions policy is narrowly tailored.

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (nominal damages available for denial of procedural due process rights) (footnote omitted); *see also Price v. City of Charlotte,* 93 F.3d 1241, 1246 (4th Cir.1996) (stating that "the rationale for the award of nominal damages being that federal courts should provide some marginal vindication for a constitutional violation").

In the present case there was indeed a constitutional violation. CMS ran afoul of the Equal Protection Clause when it adopted a strict racial quota designed to deny an available, unclaimed slot in a specialized magnet school to a child on account of the child's race. In order to recover nominal damages, Cristina Capacchione need not prove that absent the unconstitutional policy she would have been admitted to the magnet program. The injury in the present case is not the ultimate inability to enroll in the magnet school, but the inability to compete for seats on an equal basis. *See Northeastern Florida Chapter of the Associated Gen. Contractors v. City of Jacksonville,* 508 U.S. 656, 666, 113

S.Ct. 2297, 124 L.Ed.2d 586 (1993). Though the two open "black seats" at the Olde Providence magnet school were eventually awarded to white children, the fact remains that the official magnet admissions policy prohibited children like Cristina from competing for the open slots. In fact, CMS left the two available "black seats" at Olde Providence unfilled for most of the summer while Cristina and over one hundred other white children languished on a waiting list. In Orwellian fashion, CMS marketed Olde Providence as "a school to benefit everyone," but in reality permitted only a select few to compete for the benefits bestowed.

The nominal award in this case recognizes the importance of equal protection under the law and provides some measure of vindication. As for CMS's worry about collateral estoppel, liability has already been established, and vacating the nominal damages would not change this. Consequently, I would affirm the district court's award of nominal damages.

IV. Injunctive Relief

After recounting the unitary status determination and the constitutional violation in the magnet admissions policy, the district court enjoined "CMS from any further use of race-based lotteries, preferences, and set-asides in student assignment." *Capacchione*, 57 F.Supp.2d at 292. CMS challenges the district court's injunction *347 as unwarranted and overbroad. We review the grant of a permanent injunction for an abuse of discretion. *See Tuttle*, 195 F.3d at 703.

Before a court grants a permanent injunction, the court must first find necessity--a danger of future violations. *See*

Connecticut v. Massachusetts, 282 U.S. 660, 674, 51 S.Ct. 286, 75 L.Ed. 602 (1931) (stating that an injunction "will not be granted against something merely feared as liable to occur at some indefinite time in the future"); *United States v. Oregon State Med. Soc'y,* 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952) ("All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or to recur."); *Bloodgood v. Garraghty,* 783 F.2d 470, 475 (4th Cir.1986) ("An injunction is a drastic remedy and will not issue unless there is an imminent threat of illegal action."). Though a flexible tool, an injunction may not be used for "punishment or reparations for ... past violations." *Oregon State Med. Soc.,* 343 U.S. at 333, 72 S.Ct. 690.

The district court's finding of a threat of future violations centered on CMS's offering of diversity as a compelling state interest. This interest was offered after the district court decided that the admissions policy should be reviewed using strict scrutiny. Because in this circuit it is unsettled whether diversity may be a compelling state interest, *see Eisenberg v. Montgomery County Pub. Schs.,* 197 F.3d 123, 130 (4th Cir.1999), *cert. denied,* 529 U.S. 1019, 120 S.Ct. 1420, 146 L.Ed.2d 312 (2000), it was improper for the district court to base its injunction on CMS's unsuccessful defense of the policy. At this point, we can discern nothing in the record indicating that CMS will ignore the district court order and continue to use race in an unconstitutional manner in the operation of the magnet schools or other schools in the system. CMS represented to the district court both during and after trial that it had no intention of continuing the magnet plan. In moving for a stay of the injunction, CMS did not ask that the injunction be stayed as to the magnet schools, and was prepared

to comply immediately with the court's order. CMS requested a stay as to the non-magnet schools because over 50,000 students were likely to be reassigned in a short period of time. Moreover, there was no evidence presented at trial about what CMS proposed to do as a unitary school system. A post-unitary status student assignment plan was never given to the district court, and the evidence simply does not indicate that "there is an imminent threat of illegal action." *Bloodgood,* 783 F.2d at 475.

A finding of unitariness brings a fresh start for the school board--an opportunity to operate a school system in compliance with the Constitution. The prospective relief awarded by the district court is in tension with the resumption of local control, which is one of the ultimate goals of any desegregation order. *See Freeman,* 503 U.S. at 490, 112 S.Ct. 1430. Freeing the school district from one court order only to shackle it with another was here an abuse of the district court's discretion, and we therefore vacate the grant of injunctive relief.

V. Discovery Sanctions

The district court sanctioned CMS for failing to supplement its answers to interrogatories that sought a list of witnesses. We review the district court's management of discovery under the abuse of discretion standard. *See Anderson v. Foundation for Advancement, Educ. & Employment of Am. Indians,* 155 F.3d 500, 504 (4th Cir.1998). The record reveals ***348** that no list of fact witnesses was presented to the plaintiff-intervenors until five days before the trial date. At that time, CMS presented a list of 174 witness, which was later cut to twenty-six. The plaintiff- intervenors moved for sanctions and

the district court granted the motion in part. The district court continued the trial for one week so that the plaintiff-intervenors could depose the newly disclosed witnesses, and the court held CMS accountable for the fees and expenses of these depositions.

We have developed a four-part test for a district court to use when determining what sanctions to impose under Federal Rule of Civil Procedure 37. Specifically, "[t]he court must determine (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non- compliance, and (4) whether less drastic sanctions would have been effective." *Id.* An examination of the four factors reveals no abuse of discretion by the district court.

First, there is ample evidence of bad faith. Early in the case, the plaintiff-intervenors presented CMS with an interrogatory asking for disclosure of trial witnesses. In response to the interrogatory, CMS stated that it would provide appropriate information concerning witnesses at the time and in the manner specified by the district court. The plaintiff-intervenors moved to compel discovery, and the court agreed with CMS that the request was premature. However, the court instructed CMS to "supplement its responses [to the interrogatories], as it promised, when such information becomes known." J.A. I-195. As an excuse for its untimely disclosure of fact witnesses, CMS relies on the district court's pre-trial order, which provides that "[a] witness list containing the name of every proposed witness" should be filed with the court on the first day of trial. J.A. I-150. This provision of the pre-trial order was clearly for the court's convenience and could

not reasonably be interpreted to apply to disclosures to the other parties. Besides, even if such an interpretation were reasonable, the district court's command to supplement interrogatories superceded the pre-trial order. Accordingly, bad faith is evident.

Second, the presentation of such a lengthy witness list on the eve of trial to the plaintiff-intervenors was prejudicial. Without the action of the court, the plaintiff-intervenors would have had no opportunity to depose the witnesses, much less properly prepare for trial. Thus, CMS's failure to supplement interrogatories was prejudicial.

Third, such non-compliance with the district court's orders certainly needed to be deterred. The district court's condonation of CMS's bad faith at a time so close to the beginning of trial could have encouraged repetition of improper conduct. As found by the district court, the record indicates that the failure to supplement interrogatories was not the first time CMS "was lacking in candor in disclosing relevant and important information." J.A. I- 305. Hence, deterrence was essential to a proper management of this case.

Finally, less drastic sanctions would not have been effective. Permitting the plaintiff-intervenors to depose witnesses and requiring CMS to pay fees and expenses for the depositions was appropriate. CMS was fortunate to receive such a light sanction, and it is doubtful whether lesser measures would have had any effect on CMS's conduct.

In sum, the discovery sanctions imposed did not amount to an abuse of the district court's discretion.

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***349** VI. Attorney Fees

CMS argues that the district court erred in awarding attorney fees to the plaintiff-intervenors. While conceding that Grant is entitled to fees if the district court's unitary status finding is upheld, CMS argues that Capacchione cannot be a prevailing party on this issue. CMS also challenges Capacchione's receipt of fees based on the district court's magnet schools ruling because (1) Capacchione received only nominal damages, and (2) young Capacchione would not have been admitted to the magnet program even if race was not a factor insofar as her lottery number was so high. The district court's decision to award attorney fees is reviewed for an abuse of discretion. *See Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 631 (4th Cir.1999). I would affirm.

A. Attorney Fees for Unitary Status

1.

In my view, the plaintiff-intervenors are entitled under § 1988 to attorney fees for their successful litigation of the unitary status issue. Indeed, CMS has *conceded* that if we upheld the declaration of unitary status, Grant would be entitled to attorney fees.

> Unlike Capacchione, the Grant intervenors were granted declaratory and injunctive relief related to the issues of unitary status and CMS' magnet school admission policies. Therefore, the entitlement of the Grant intervenors to recover attorneys' fees is tied directly to the merits of those claims.

CMS's Brief at 39-40. Surprisingly, despite CMS's concession, a majority of this court vacates the award of fees to both Capacchione and Grant.

By obtaining a declaration of unitary status, the Grant plaintiffs, along with Capacchione, finished what the original *Swann* plaintiffs started. If we deny the plaintiff-intervenors the ability to be compensated in a situation such as this--where an incredible amount of legal work is required and the board, for improper reasons, clings to the court's order--then we give to litigants like the *Swann* plaintiffs effective control over the decision of "when" or even "if" a unitary status hearing will be sought because they would be the only ones who could ever obtain reimbursement for their legal fees. The practical consequences are scarcely more apparent than in this case, where the only party ruled entitled to obtain attorney fees for finishing the job was opposed to seeing unitary status declared. This, coupled with the fact that the plaintiff-intervenors received a court order in their favor on the unitary status question as a continuation of the original § 1983 action, leaves me at a loss to see how the district court's award of attorney fees to them under § 1988 can be reversed.

Under 42 U.S.C.A. § 1988(b) (West Supp.2000), "[i]n any action or proceeding to enforce a provision of [§ 1983 and other civil rights laws] ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." To be considered a prevailing party, a party must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v. Hobby,* 506 U.S. 103, 109, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (internal quotation marks omitted).

This case began in 1965 as a § 1983 action with the *Swann* plaintiffs seeking conversion of CMS "into a unitary nonracial system wherein the educational opportunities offered by [the board] are made available to students without regard to race or color." J.A. XXXIII-16,162 (original *Swann* complaint commencing an action ***350** under § 1983); *see also Monell v. Department of Social Servs.*, 436 U.S. 658, 697, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (observing that school desegregation actions "have almost without exception been § 1983 suits"). In essentially a continuation of what was begun in 1965, Capacchione, believing that CMS had established a unitary school system, brought suit pursuant to § 1983 and prayed that the district court enter a declaration of unitary status. *See* J.A. I-110 (Capacchione amended complaint seeking a declaration of unitary status); *see also* J.A. I-140 (Grant complaint seeking a declaration of unitary status); *cf. Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir.2001) (§ 1983 action seeking declaratory relief). Shortly after Capacchione filed suit, the *Swann* plaintiffs moved to reactivate *Swann* and to consolidate it with Capacchione's action. The district court granted the *Swann* plaintiffs' motion and later permitted Capacchione to intervene in *Swann*. Grant, who also sought a declaration of unitary status, then moved to intervene in the consolidated action, and the district court granted his motion. After months of litigation, the plaintiff-intervenors succeeded in having CMS declared unitary, and this court has affirmed on appeal.

With the prior court orders now dissolved, CMS must cease using the orders to assign Grant's children as well as all

other public school students on account of their race.[16] A unitary school system is what the original plaintiffs sought in 1965, and the plaintiff-intervenors have greatly assisted in the final stages of this litigation in making unitariness a reality. Henceforth, unless CMS's use of racial classifications satisfies the requirements of strict scrutiny, the color of a child's skin will no longer be a permissible basis for assigning, or refusing to assign, a child to a conventional public school or a specialized magnet program. *See Farrar,* 506 U.S. at 110, 113 S.Ct. 566 (observing that declaratory relief may constitute relief under § 1988 "if[ ] it affects the behavior of the defendant toward the plaintiff") (internal quotation marks omitted). Moreover, this declaration of unitary status is enforceable against CMS in the unlikely event it later attempts to continue prior assignment polices, say, on the ground that vestiges of prior discrimination have not been eradicated. *See id.* at 111, 113 S.Ct. 566 (explaining that to be a prevailing party an enforceable judgment must be obtained).

In the present case, with its counter-intuitive alignment of parties, the plaintiff-intervenors have stepped into the shoes

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[16]CMS argues that because Capacchione no longer resides in North Carolina the unitary status declaration does not alter CMS's behavior toward young Capacchione and consequently Capacchione is not a prevailing party entitled to fees. In other words, CMS contends that Capacchione's lack of standing counsels against an award of fees. I disagree. At the very least, because of Capacchione's status as a plaintiff-intervenor in *Swann,* Capacchione is still entitled to fees. *See Shaw v. Hunt,* 154 F.3d 161, 167 (4th Cir.1998) (noting that when plaintiffs with standing "secure[ ] precisely the relief that they sought," plaintiff-intervenors who lack standing but contributed to the litigation may also be awarded attorney fees). Grant, who CMS concedes has standing and is entitled to fees, achieved the relief originally sought--a declaration of unitary status. Capacchione greatly contributed to this result, and under *Shaw* is entitled to fees just as Grant.

of the *Swann* plaintiffs, continued the original § 1983 action, and brought this case to a close. Just as the *Swann* plaintiffs, prior to removal of the case from the active docket, were compensated for their services, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C.1975) (awarding the Swann plaintiffs $204,072.33 in fees and costs), so too ***351** should the plaintiff- intervenors be compensated for a continuation of the legal efforts to achieve a unitary school system and to remove federal court control. In this regard the plaintiff-intervenors have acted as "private attorney[s] general," *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758-60, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989) (internal quotation marks omitted) (alteration in original), and obtained a finding of unitariness, which was the ultimate objective of the original action. *See* J.A. XXXIII-16,162 (original complaint seeking "reorganization of the school system into a unitary nonracial system"). Indeed, no one disputes that the *Swann* plaintiffs would have been entitled to fees if they had taken the initiative to petition for a declaration of unitary status instead of acting to oppose the result we reach today.

Without question, the monitoring of a school desegregation decree is crucial to the dismantling of the dual system. *See Jenkins v. Missouri*, 967 F.2d 1248, 1251 (8th Cir.1992) (awarding fees in desegregation case pursuant to § 1988). Accordingly, efforts "to insure full compliance and to ensure that the plan is indeed working to desegregate the school system[ ] are compensable services." *Northcross v. Board of Educ.*, 611 F.2d 624, 637 (6th Cir.1979). Here, the plaintiff-intervenors observed CMS's progress in dismantling the dual system, and once convinced that full compliance had been achieved, they moved for a declaration of unitary status.

In so doing, the plaintiff-intervenors were faced with a recalcitrant school board that insisted none of the *Green* factors had been satisfied. The *Swann* plaintiffs, though having never returned to court to complain about the continuation or revival of segregative practices, suddenly claimed that the dual system was not being dismantled and joined the school board in the quest for continuation of court supervision. Though most of the vital information was in the hands of CMS's officials, who were often uncooperative in the discovery process, *see Capacchione,* 57 F.Supp.2d. at 292-293 (cataloging sanctions and threats of sanctions against CMS), the plaintiff-intervenors persevered and ultimately obtained a declaration of unitary status. But for the actions of the plaintiff- intervenors, CMS, though having dismantled the dual system, would still be using the district court's orders as mechanisms for attaining other goals. Despite the progress of the last three decades, CMS was apparently content to forestall a finding of unitariness for the foreseeable future. *See Freeman,* 503 U.S. at 490, 112 S.Ct. 1430 (observing that restoration of local control "at the earliest practicable date" is a goal of any desegregation order). Consequently, I believe that the plaintiff-intervenors, for stepping in and finishing what was begun in 1965, are entitled to attorney fees under § 1988 for their litigation of the unitary status issue.

2.

I would also affirm the plaintiff-intervenors' award of attorney fees, based on the unitary status declaration, under this circuit's exceptional circumstances doctrine. *See Rolax v. Atlantic Coast Line R. Co.,* 186 F.2d 473, 481 (4th Cir.1950) (holding that absent a statute attorney fees are normally unavailable unless "the taxation of such costs is essential to the

doing of justice ... in exceptional cases"). To avoid a declaration of unitary status, CMS has clung to the desegregation decree for improper reasons, *see supra* part II.H, and the equitable remedy ordered in 1969 "would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded" to the plaintiff-intervenors. *352*Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963) (en banc) (awarding attorney fees in school desegregation case based on exceptional circumstances when the school board engaged in a "pattern of evasion and obstruction" which "cast[ ] a heavy burden on the children and their parents"). A contrary result would hamper the involvement of concerned citizens in school desegregation litigation and permit school boards that are inclined to remain under court order to eschew a unitary status hearing.

I recognize that the Supreme Court recently rejected the catalyst theory as a basis for awarding attorney fees. *See Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). However, the award of fees in the present case has never been based on the catalyst theory, "which posits that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 1838 (internal quotation marks omitted). In this case, there was no voluntary change in CMS's conduct. CMS clung to the desegregation orders and put up a vigorous defense in the course of a two-month trial. A final judgment was handed down, and any change in CMS's behavior will be due to the district court's decree, not a voluntary act. While a "voluntary change in conduct ... lacks the necessary judicial *imprimatur* on the change" for a plaintiff to be considered a prevailing party, a declaration of unitary status is

far different. *Id.* at 1840. Once found to be in violation of the Constitution, a school district cannot be declared unitary without the order of a court. Because the district court's order, and not a voluntary act, is the impetus behind any change, the rejection of the catalyst theory in *Buckhannon* does not undermine an award of attorney fees based on the exceptional circumstances doctrine of *Rolax*.

B. Attorney Fees for the Magnet Schools Litigation

I would also find that Capacchione is entitled to fees because he is a prevailing party on the magnet schools issue. The district court held that the magnet schools admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and awarded nominal damages in light of the constitutional violation. In *Farrar*, the Supreme Court specifically addressed the issue of nominal damages and prevailing party status:

> We therefore hold that a plaintiff who wins nominal damages is a prevailing party under § 1988.... A plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages. A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.

506 U.S. at 112-13, 113 S.Ct. 566 (internal citations omitted). The award of nominal damages constitutes relief on the merits and affects CMS's behavior toward Capacchione if only by forcing CMS to pay. Hence, Capacchione is a prevailing party.

See also Shaw v. Hunt, 154 F.3d 161, 164 (4th Cir.1998) (noting that "persons within the generic category of plaintiff-intervenors have often been found by courts to fit within the rubric 'prevailing party' for fees purposes"). That young Capacchione had a high lottery number is irrelevant for a determination of prevailing party status. As previously stated, the injury in this case was the inability to compete for open magnet seats, not the denial of admission to a magnet program. Because I would ***353** find that Capacchione rightly prevailed on the magnet schools issue, I would affirm the district court's award of attorney fees for work in this area as well.

VII.

For the foregoing reasons, a majority of this court affirms the district court's declaration of unitary status and the imposition of discovery sanctions. We vacate the district court's injunction because we can discern no danger of future violations. Additionally, I would affirm the finding of a constitutional violation in the magnet schools admissions policy, the award of nominal damages, and the attorney fees awarded pursuant to 42 U.S.C.A. § 1988.

WILKINSON, Chief Judge, concurring in part:

I concur in Parts I, II, IV, and V of Judge Traxler's thorough opinion. With respect to Parts III and VI, I respectfully take a different view.

I.

There can be no doubt that if the 1992 Charlotte-Mecklenburg magnet school program were adopted

today, it would be unconstitutional and in violation of our holdings in *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir.1999), and *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir.1999). Those holdings properly emphasize the ecumenical premise of the Fourteenth Amendment that every American citizen regardless of race or ethnicity is deserving of equal dignity under the law.

The more difficult question is whether the adoption of the magnet school program in 1992, at a time when the school board was under a court desegregation order, stripped the Board of its immunity. I would hold that it did not. Inasmuch as the Board did not forfeit its immunity, I would vacate the award of damages against it and the fees and costs assessed thereon.[17]

Both the Supreme Court's *Swann* opinion and various lower court opinions relied for many years upon numerical benchmarks as an indicia of progress in achieving school desegregation. That emphasis, however, was primarily the work of the courts, not the school board. And judicial decisions further made clear that the Charlotte-Mecklenburg

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[17]Although the Grant plaintiffs have prevailed with regard to the unitary status determination, their basis for prevailing was not an action under 42 U.S.C. § 1983. Accordingly, there exists no statutory basis here for deviating from the American Rule. Under this rule, fees are not generally awarded to prevailing parties "absent explicit statutory authority." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 1837-39, 149 L.Ed.2d 855 (2001) (internal quotation omitted). And the Supreme Court has emphasized that the judiciary enjoys no "roving authority" to award counsel fees "whenever the courts might deem them warranted." *Id.* at 1843.

school board could take the numerical approach of the courts even further in the course of devising desegregative remedies of its own.

For instance, in *Swann,* the Supreme Court itself held that: "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude ... that in order to prepare students to live in a pluralistic society *each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.* To do this as an educational policy is within the broad discretionary powers of school authorities." *354*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (emphasis added).

Likewise, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383 (4th Cir.1974) (en banc) (per curiam), parents of white students brought suit against the school board because it allegedly had established a set-aside for African-American students to take part in its gifted students program. *Id.* at 383. This court affirmed an injunction prohibiting the plaintiffs from proceeding in state court. We held that the plaintiffs' suit could affect the school board's efforts to comply with prior federal court desegregation orders, including one which required the Board to assign students in such a manner that the schools would have about the same proportion of African-American and white students. *Id.* at 384.

And the district court's desegregation orders in this case can fairly be read to encourage, rather than foreclose, the conduct in which the school board here engaged. For instance, in 1970, Judge McMillan ordered that "the defendants maintain a continuing control over the race of children in each school, ...

and maintain the racial make-up of each school .... The defendants are encouraged to use their full 'know-how' and resources to attain the results above described, and thus *to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the results."* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F.Supp. 265, 268-69 (W.D.N.C.1970) (emphasis added). And four years later, in an order addressing optional schools, which were the precursors of the magnet schools, Judge McMillan ordered that: "Strict and central control must be exercised over all admissions (reassignments) to each optional school in order to fulfill the necessary ends that these schools ... be integrated by grade *at or above approximately a 20% black ratio."* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F.Supp. 1102, 1108 (W.D.N.C.1974) (emphasis added).

While this case was removed from the active docket in 1975, Judge McMillan noted that: "This case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 67 F.R.D. 648, 649 (W.D.N.C.1975); *see also Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F.Supp. 1318, 1340 (W.D.N.C.1979) (upholding the school board's 1978 pupil assignment plan which took into consideration the race of the student).

Magnet schools are a widely used desegregation device. It is true that in the early 1990's, the school board in its magnet program eagerly accepted the courts' invitation to rely upon numerical benchmarks. I believe, however, that it is necessary to afford a school board some latitude in attempting to meet its desegregative obligations if we are not to undermine the rule of law. To do otherwise leaves the Board between a rock and a

hard place. Namely, if the school board fails to carry out the court desegregation order, it can be cited for contempt or held not to have achieved unitariness. But if the Board acts aggressively to implement the court order, it risks facing judicial condemnation and the threat of litigation on the grounds that it was acting *ultra vires.* This is not the kind of quandary into which we should force institutions that are, for better or worse, under judicial decree.[18] Such an approach risks undermining respect for ***355** courts and, indeed, encouraging just the opposite.

My fine colleague, Judge Luttig, insists that the issue here has solely to do with racial quotas. I have strongly disapproved of the use of such quotas. *See, e.g., J.A. Croson Co. v. City of Richmond,* 822 F.2d 1355 (4th Cir.1987), *aff'd,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072 (4th Cir.1993). Indeed I believe them to be inimical to a national future founded, as the Fourteenth Amendment requires, upon individual respect and mutual self-regard. Yet to see the sole issue here as racial quotas is to miss the forest for the trees. The cumulative message of innumerable court orders conveyed to the Charlotte-Mecklenburg board over the course of many years was to do everything possible to desegregate Charlotte schools. *See, e.g., Swann,* 402 U.S. at 15, 91 S.Ct. 1267 ("[S]chool authorities are 'clearly charged with the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch.' ") (quoting *Green v. County Sch.*

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[18]The quandary in fact is illustrated by this very case where five members of the court feel the Board went too far in its remedial efforts, and four others believe just as strongly that the Board did not go far enough.

Bd., 391 U.S. 430, 437-38, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968)) (emphasis added). And the school board attempted to do just that. To now condemn the Board would be to sanction the future disrespect and disregard for court orders of all sorts. This I am unwilling to do.

If an existing court order is infirm, the better course is to modify it through customary court processes. Today, we follow this approach with our determination that the school district has attained unitary status. This holding puts the school district on a race-neutral footing going forward, thereby granting it a truly fresh start. The solution to the fundamental Fourteenth Amendment problems with the 1992 magnet school plan is not to hold the Board liable for its attempts to implement the very policies, and attain the very ends, which the courts had ordered it to do. The answer is to point to a unitary future in which the principle of non-discrimination will guide its public actions.

II.

I concur fully in Judge Traxler's view that the Charlotte-Mecklenburg school system has achieved unitary status. I recognize that some citizens of Charlotte, aware of society's shortcomings on matters of race, may see in unitariness a mocking phrase. Others may view today's embrace of local governance as an act of judicial abandonment. The luminosity of *Brown v. Board of Education* is such that many have come to look at courts as our sole guiding lights. Yet they were never meant to be such. If it was important that courts nurture the task of desegregation in its infancy, it is equally essential that a school district one day depart the comforting judicial homestead and strike out on its own.

School districts will be stronger for finding their own way. For in the long run, courts cannot serve as the sole source of hope in the difficult area of desegregation, nor democracy as the object of fear. "Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course." *Freeman v. Pitts,* 503 U.S. 467, 490, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992).

The question then is whether the Charlotte-Mecklenburg system is ready for this step. The district court concluded that it ***356** was. *See Riddick v. School Bd. of the City of Norfolk,* 784 F.2d 521, 533 (4th Cir.1986) (holding that the district court's unitary status finding is reviewed for clear error). It is, I suppose, possible for us to reweigh the evidence or to refract this or that school board decision through a myriad of lenses. While any record, thus dissected, would be found to reveal its share of imperfection, a reversal of the district court's finding of unitariness would do a profound disservice to the people of Charlotte. The recent history of Charlotte, as Judge Traxler's careful opinion demonstrates, is not one of resistance and intransigence. Rather it shows a community struggling to meet its desegregative obligations in a period of staggering demographic change. Most importantly, African-Americans are vigorous participants both in the elective and deliberative process with regard to Charlotte's schools.

Of course, the majority's sense of progress may be the dissent's sense of great unfinished business. And let us suppose just for a moment that both are right. Still, I doubt that interminable court proceedings can convey to Americans the sense that we are in the enterprise of education together. For litigation depends for its energy on adversarial alignments, i.e., the school board and *Swann* plaintiffs are tentatively aligned, but the *Swann* plaintiffs and *Capacchione* plaintiffs are decidedly not. And while democracy has no shortage of conflict, reaching decision and compromise from within the community, as opposed to the external compulsion of court order, promises a better mutual understanding and a firmer common ground.

That at least is the hope. In this sense, then, unitariness is not an act of abandonment but a covenant of faith. It reflects a judicial belief, well supported by this record, that the invidious practices of an indefensible era have indeed been dismantled and that Charlotte has earned the right to begin anew. No decisions are more sensitive and difficult than those involving public schools, and no process is more wrenching than that of matching limited resources to a limitless array of educational needs. But these challenges are better met by communities than by courts and, after thirty-five years of sporadic judicial supervision, the time has come to conclude. If not now, when? Each child is a human being to educate. If this essential task of education has become too daunting for democracy, then I know not who we are or what we shall become.

I am authorized to say that Judge Niemeyer joins in this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in or dissent from parts of the various opinions of the court and its various members, as indicated below, and I also respectfully dissent to the failure of the court to review the items of the judgment of the district court from which appeal is taken.

I.

We review judgments, not opinions, e.g. *Chevron USA, Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Hyatt v. Sullivan,* 899 F.2d 329, 337 n. 10 (4th Cir.1990). The judgment of the district court, a copy of which is attached hereto as Exhibit A, is divided into five parts, which are:

1. The Charlotte-Mecklenburg schools are declared unitary in all respects;

2. All prior injunctive orders or decrees in the *Swann* case are vacated and dissolved and the case is dismissed with prejudice;

*357 3. The Charlotte-Mecklenburg school system shall pay nominal damages to the Plaintiff Intervenors in the amount of $1;

4. Charlotte-Mecklenburg schools are enjoined from assigning children to schools or to allocate educational opportunities on the basis of race;

5. The Charlotte-Mecklenburg school system will pay reasonable attorneys fees, expert fees and costs of the Plaintiff-Intervenors.

And the district court, in another order, imposed sanctions on the defendants. A copy of relevant parts of that order is also attached as Exhibit B.

I vote to affirm the *judgment* of the district court in each respect, including the sanctions order, except that I would vacate the judgment of the district court as to Item 4, listed in Part I above, only on the ground it is unnecessary, the school board having given no indication that it will not comply with the orders of the court in this case.

II.

Despite universally accepted appellate procedure that we review judgments, not opinions, the other members of this court, without mention of the judgment of the district court, have divided a per curiam opinion into four issues, only the last two of which, concerning injunctive relief and sanctions, relate directly to the judgment of the district court we are reviewing. The first two issues, as stated in the per curiam opinion of the court, are phrased by a floating majority.

Only because each of those majorities declines to vote to affirm or reverse the various items of the judgment of the district court, I will attempt to relate my votes to the per curiam opinion.

As to Item 1, I vote that the school system has achieved unitary status. Also as to Item 1, I vote that the attorneys' fees for work done on the unitary status issue, and any other issue tried in this case, except a few dollars relating to Miss Capacchione's moving, should be granted. The majority, however, while it denies fees on "the unitary status issue," apparently does not immediately mention the fees of Miss Capacchione's attorneys, amounting to the sum of about $700,000, and one might think from reading the per curiam opinion that they were yet awarded were it not for the next-to-the-last line of the per curiam opinion denying fees "for any reason."

As to Item 2 of the per curiam opinion, I am in agreement with the district court, that the school board should have come back to it for authority to establish magnet schools in which the race of the applicant was considered in deciding whether or not to grant admission. The district court so construed its own orders, which it is best able to do, and to which we must give due deference. *Anderson v. Stephens,* 875 F.2d 76, 80 n. 8 (4th Cir.1989); *Vaughns v. Board Educ. of Prince George's County,* 758 F.2d 983, 989 (4th Cir.1985). I need go no further to affirm the holding of the district court. I am of opinion that Miss Capacchione's Constitutional rights were violated when she was not considered for admission to the magnet school program notwithstanding her race and that she is entitled to nominal damages on that account. *Norwood v. Bain,* 166 F.3d 243 (4th Cir.1999) (en banc).

Also as to Item 2, although I feel that the question of immunity has little or nothing to do with this case, because it is being used to rationalize that the successful attorneys do not get their attorneys' fees and that nominal damages for a

Constitutional violation are not due, I vote that the school board did not have immunity from the payment of attorneys' fees, nor immunity***358** from nominal damages, that is to say, in the language of the per curiam opinion, it has been forfeited.

As to Items 3 and 4, the per curiam opinion correctly states my votes.

III.

With only slight interruptions, this case had been on inactive status for 22 years until Christina Capacchione started the present litigation when she filed her first complaint on September 5, 1997, seeking to be considered for admission to the magnet school program without regard to her race. When, on March 6, 1998, the district court ordered the *Swann* litigation reactivated, upon the motion of the *Swann* plaintiffs, it consolidated the Capacchione suit with the *Swann* litigation. Miss Capacchione then amended her complaint on March 16, 1998, to request a declaration that the school system had reached unitary status and moved on March 19, 1998 to intervene in the reactivated *Swann* litigation, which motion was granted. The Grant plaintiffs subsequently filed their complaint and motion to intervene in the *Swann* litigation on April 8, 1998.

When Christina Capacchione filed her suit, the Charlotte-Mecklenburg schools were only admitting students to the magnet school program after having considered their race, and the school system was submitting itself to the racially-based pupil assignments imposed in response to the orders of the district court some years before, the suit having then been inactive for some 22 years. Now, four years and

almost $1.5 million later, and over the determined opposition of the school board, the school system has been held to be unitary and the magnet schools may no longer consider the race of the applicant in granting or denying admission. *All this is at the instance of Christina Capacchione.*

When the *Swann* plaintiffs filed their suit in 1965, more than 35 years ago, their complaint was that the race of students was considered in determining their assignment to schools, precisely the same complaint that Christina Capacchione had in 1997. When the *Swann* case was declared to be inactive in 1975, the district court, at that time, awarded attorneys' fees and costs to the plaintiffs' attorneys, for service through 1974, in the amount of $204,072.33, and there are doubtless other such items not presently readily available to me. For us to hold now that the Capacchione child and the Grant plaintiffs are not entitled to the same consideration, as were the *Swann* plaintiffs, for eradicating racial assignments is certainly not fair and not even legal, in my opinion. How we are able to hold that the Capacchione and Grant plaintiffs and intervenors in this case are not successful parties in a § 1983 action strains reason beyond the breaking point. In my opinion, they are due costs, expenses, and attorneys' fees, etc. under 42 U.S.C. § 1988.

Especially to the holding of the en banc court, that the Capacchione and Grant plaintiffs and intervenors are not entitled to attorneys' fees and costs, etc., I respectfully dissent.*

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*My summary of such fees and costs is attached as Exhibit C.

*359 EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

William CAPACCHIONE, Individually and on behalf of Cristina Capacchione, a Minor,

Plaintiff,

and

Michael P. Grant et al.,

Plaintiff-Intervenors, 3:97-CV-482-P

v.

CHARLOTTE-MECKLENBURG SCHOOLS et al.,

Defendants.

JAMES E. SWANN et al.,

Plaintiffs,

v. 3:65-CV-1974-P

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION et al.,

Defendants.

***360** JUDGMENT

In accordance with the Memorandum of Decision and Order filed simultaneously with this Judgment, IT IS ORDERED ADJUDGED, AND DECREED that the Charlotte - Mecklenburg Schools ("CMS") are hereby declared unitary in all respects,

IT IS FURTHER, ADJUDGED, AND DECREED that all prior injunctive orders or decrees entered in Swann v. Charlotte Mecklenburg Bd. of Educ., No. 1975 (W.D.N.C.) are VACATED AND DISSOLVED, and Swann is hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Capacchione and grant et al. (the "Plaintiff Intervenors") are not entitled to an awarded of actual damages, but CMS shall pay nominal damages to the Plaintiff-Intervenors in the amount of one dollar ($1.00).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that CMS is enjoined for assigned children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that CMS shall pay the reasonable attorneys' fees, experts fees, and costs of the Plaintiff-Intervenors.

This the 9th day of September 1999.

***361** EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

William CAPACCHIONE, Individually and on behalf of Cristina Capacchione, a Minor,

Plaintiff,

and

Michael P. Grant et al.,

Plaintiff-Intervenors, 3:97-CV-482-P

v.

CHARLOTTE-MECKLENBURG SCHOOLS et al.,

Defendants.

JAMES E. SWANN et al.,

Plaintiffs,

v. 3:65-CV-1974-P

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION et al.,

Defendants.

***362** MICHAEL P. GRANT et al.,

Plaintiff-Intervenors,

v. Case No. 3:65-CV-1974-P

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION et al.,

Defendants.

ORDER

THESE MATTERS are before the Court on a Motion by Plaintiff Capacchione and Plaintiff-Intervenors Grant et al. (hereinafter collectively "Grant"), filed April 16, 1999, for Sanctions against Charlotte-Mecklenburg Board of Education for Non-Disclosure of Witnesses [document no. 152]. Defendants Charlotte-Mecklenburg Schools et al.

***

NOW, THEREFORE, IT IS ORDERED that Grant's Motion for Sanctions against Charlotte-Mecklenburg Board of Education for Non-Disclosure of Witness [document no. 152] be, and hereby is, GRANTED.

This the 23rd day of April 1999.

*363 EXHIBIT C

Fees and Hours by Firm

Total expended on merits of the suit by both Grant and Cappachione = Fees and costs of $1,481,295.47 and 6,428.95 hours

Total expended on fee petition by both Grant and Cappachione = Fees and costs of $17,721.00 and 74.35 hours

Total expended on all litigation (including a fee petition) by all plaintiffs = $1,499,016.47 and 6,503.2 hours

A. Counsel for Cappachione

(1) McGuire Woods Battle & Booth (John Pollard & Kevin Parsons)
Fees on the merits = $390,791.98
Attorney and staff Hours on the merits = $1,954.5
Fees for bringing fee petition = $4,000.00
Attorney and staff hours for bringing fee petition = 21.2

(2) Magenheim, Bateman, Robinson, Wrotenbery & Helfand (William Helfand)
Fees on the merits = $325,331.51
Attorney and staff Hours on the merits = $1,553.85
Fees for bringing fee petition = $3,372.50
Attorney and staff hours for bringing fee petition = 17.8

Total for Cappachione on the merits = $716,123.49 and 3,508.35 hours
Total for Cappachione for bringing fee petition = $7,372.50 and 38.9 hours

B. Counsel for Grant Plaintiff

(1) Parks, Chesin & Miller (A. Lee Parks)
Fees on the merits = $471,794.00
Attorney and staff Hours on the merits = 2,160.7
*364 Fees for bringing fee petition = $9,750.00
Attorney and staff hours for bringing fee petition = 32.50

(2) Thomas Ashcraft
Fees on the merits = $9,750.00
Attorney and staff hours for brining fee petition = 759.9
Fees for bringing fee petition = $598.50
Attorney and staff hours for bringing fee petition = 2.85

(3) In a supplemental order, Judge Potter awarded Parks and Ashcroft jointly $133,798.98 for expenses incurred litigation the merits.

Total for Grant Plaintiffs on the merits= $765,171.98 and 2,920.6 hours

Total for Grant Plaintiffs for bringing fee petition = $10,348.50 and 35.35 hours.

LUTTIG, Circuit Judge, concurring in the judgment in part and dissenting from the judgment in part:

I concur in the opinion of the court that the Charlotte-Mecklenburg School System is now unitary, following 35 years of federal court supervision. I also agree with the conclusion reached by Judge Traxler that the School Board acted without the required authorization from the district court both when it created its expansive magnet school program and when it imposed a fixed quota to govern admissions to that program. Neither the creation of the magnet school program nor the imposition of a rigid quota governing admission into that program were authorized by the district court, and both clearly constituted "material changes" from the district court's prior remedial orders, requiring prior court approval. I also agree with Judge Traxler's narrowest conclusion that, absent a proven necessity for such, an admissions program that permanently employs fixed ratios to deny certain students, solely because of their race, the opportunity to compete for seats that will otherwise be left unfilled even after all targeted minorities have been allotted seats (and I assume fixed ratios in a remedial context to be constitutional), is insufficiently tailored to withstand scrutiny.

I address myself separately only to the question whether the district court authorized the strict mathematical quota adopted by the School Board in 1992 to govern admissions to Charlotte-Mecklenburg's magnet school program, a quota that, as noted, required officials literally to leave seats unfilled even after all interested minority students had been afforded an opportunity to attend the magnet school of their choice.

I.

With respect to the magnet school program's admission policy, the holding of the district court that we review is that that court had "firmly rejected the use of rigid racial quotas," 57 F.Supp.2d 228, 286 (W.D.N.C.1999), and that, in contravention of those orders and the Supreme Court's decision in ***365***Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), the School Board had "us[ed] mathematical ratios not as a starting point but as an ending point." 57 F.Supp.2d at 289. "In policy and in practice, the[magnet schools'] 60/40 ratio requirement [was] an inflexible quota[,]" the district court found, *id.* at 288, and "slots reserved for one race [would] not be filled by students of another race." *Id.* at 289. Indeed, the court observed, "it was not uncommon for the school year to begin with seats remaining vacant because students of one race would disrupt the desired racial balance." *Id.* Accordingly, the district court held that the magnet school program constituted a "material departure" from the court's prior remedial orders. *Id.* at 287.

As to whether the rigid quota imposed by the School Board was authorized by the district court, the question is not whether the court's orders authorized *race-conscious* admission decisions, as the School Board argues, *see* Br. of Appellants Charlotte-Mecklenburg Board of Education, *et al.* at 20 ("The particular desegregation tool struck down by Judge Potter--magnet schools with race conscious admissions guidelines--has been repeatedly recognized by the Supreme Court and other courts as a valid exercise of the broad remedial discretion of both district courts and school authorities."), and as Judge Motz and Judge Wilkinson contend by way of strawman. It is indisputable that race-conscious admission

decisions were authorized by the district court's orders; not even the plaintiffs argue that they were not. Neither is the question whether parties are required to obey court orders, the only question addressed by the authorities relied upon by Judge Motz; of course, they are. Nor is the question whether quotas were "foreclosed" by the district court's orders, as Judge Wilkinson alternatively maintains; it should be evident that a party does not receive immunity for any and all conduct that is merely unforbidden by judicial order.

And finally, the issue is not whether racial quotas are or are not constitutional. There simply is no occasion in this case for a general expression of viewpoint as to the use of racial quotas and, although I am given pause over Judge Wilkinson's express and categorical rejection of racial quotas, whatever the circumstance, I certainly express no such general view herein. I might well be presented with circumstances in which I would conclude that racial quotas were essential to the vindication of constitutional right. And I would be most reluctant to foreclose myself from such a conclusion in an appropriate circumstance by statements in a case in which the issue was not even before the court.

Rather, the only issue relevant to the question of whether the School Board is entitled to immunity is whether the district court *specifically authorized* the School Board's imposition of *rigid quotas* (*i.e.*, whether the Board was acting pursuant to court order in imposing the fixed quotas), which denied students the opportunity to compete for unfilled seats solely because of their race. If the court did specifically authorize the use of fixed quotas, then the School Board is entitled to immunity; if it did not, then immunity is unavailable. The authorities on this score are uniform. *See,*

e.g., McCray v. Maryland, 456 F.2d 1, 5 (4th Cir.1972) (observing that the law provides immunity for those whose actions are taken "in obedience to a judicial order or under the court's direction"); *see also Rogers v. Bruntrager,* 841 F.2d 853, 856 (8th Cir.1988) (holding that clerks of court are immune from damages arising from acts they are "*specifically required* to do under court order at a judge's direction") (internal citations omitted) (emphasis added); ***366***Lockhart v. Hoenstine,* 411 F.2d 455, 460 (3d Cir.1969) (providing immunity for officers who act "pursuant to" a court order); *cf. DeFelice v. Philadelphia Bd. of Educ.,* 306 F.Supp. 1345 (E.D.Pa.1969) (extending immunity to school boards that take actions pursuant to an order of a state commission). *Compare Wilkinson v. Forst,* 832 F.2d 1330, 1334 (2d Cir.1987) (granting immunity to officers who conducted searches "specifically authorized" by court orders) *with Wooley v. City of Baton Rouge,* 211 F.3d 913, 927 (5th Cir.2000) (denying immunity to officers who removed a child from a home without "specific authorization" by a court). Whether racial quotas are, as a general matter, constitutional has nothing whatsoever to do with the resolution of this issue. If the district court authorized strict racial quotas, then the School Board is entitled to immunity *whether or not* such strict quotas are constitutional.

Judge Wilkinson misunderstands this issue altogether, as is evident from both his extended and unnecessary discussion of racial quotas in general and his mistaken observation that I "insist" "the issue here has solely to do with racial quotas." Judge Motz, in contrast, understands the issue presented, but errs in its resolution because of a reliance upon fundamentally inapplicable authorities.

II.

Most certainly the district court did not specifically authorize the School Board to employ fixed quotas in the admission of students to its magnet schools, as the district court itself held. There is not even an argument that it did. Indeed, although fatal to their holding that the board is entitled to immunity, Judges Motz and Wilkinson do not even suggest otherwise. Nor could they.

Not only the very district court in question, but the Supreme Court of the United States itself in this very litigation, both explicitly and consistently disavowed the use and constitutional legitimacy of rigid quotas throughout the thirty-plus year history of Charlotte-Mecklenburg's desegregation efforts. In fact, in the course of this very litigation, even the Charlotte-Mecklenburg School Board has strenuously argued against the fact and the constitutionality of any judicially-imposed quotas by the district court.

A.

Beginning over thirty-two years ago, in this identical litigation, Judge McMillan himself acknowledged the well-recognized and well-understood distinction between race-conscious decisions and rigid quotas, which is ignored by Judge Motz and variously ignored and misunderstood by Judge Wilkinson today. And he could not have been clearer that he would permit the former in pursuit of integration of the Charlotte-Mecklenburg school system, but forbid the latter--and he never wavered from that position. Said Judge McMillan at that time, in terms whose import is unmistakable for the issue before us, although "[r]ace may be considered in eliminating

segregation in a school system," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F.Supp. 1299, 1312 (1969), "*[f]ixed ratios of pupils will not be set.*" *Id.* (emphasis added). Judge McMillan's words bear repeating: "*Fixed ratios of pupils will not be set.*" And in emphasis of the distinction he drew between fixed ratios and race-consciousness, he noted that although "efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, *[it is necessary] to understand that variations from that norm may be unavoidable.*" *Id.* (emphasis added).

***367** Only two months later, Judge McMillan repeated that his order "[was] not based upon any requirement of 'racial balance,' " *Swann v. Charlotte- Mecklenburg Bd. of Educ.*, 311 F.Supp. 265, 267 (1970). He explained in no uncertain terms that the earlier-referenced 71-29 ratio, which our court today holds specifically authorized imposition of an inflexible quota, was merely a starting point in pursuit of the goal of desegregation. *See id.* at 267-68.

And a year later, Judge McMillan again explicitly rejected fixed, rigid quotas, re-emphasizing that " 'racial balance' is not required by this court." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F.Supp. 786, 792 (1970). Indeed, the court recited, the previous order "expressly contemplated wide variations in permissible school population." *Id.*

B.

Not only did Judge McMillan, in his own orders, repeatedly reject the use of fixed quotas, the Supreme Court of

the United States, in reviewing Judge McMillan's orders, categorically rejected even an urged construction of these orders that would authorize fixed quotas. In reviewing Judge McMillan's Order of February, 1970 (*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F.Supp. 265 (1970)), the Supreme Court unambiguously stated, in a passage that should be dispositive of whether the district court previously, *and certainly at any time thereafter*, specifically (or otherwise) authorized the use of quotas, that it affirmed Judge McMillan's order only on the condition that it *not* be read to authorize fixed rigid quotas:

> *If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.* The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (emphasis added); *see also Winston-Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1227, 92 S.Ct. 1236, 31 L.Ed.2d 441 (1971) (Burger, C.J., in Chambers) (describing as "disturbing" the School Board's "understanding that it was *required* to achieve a fixed 'racial balance' that reflected the total composition of the school district"). Only a "very limited use" of "mathematical ratios," as a "starting point," was within the "equitable remedial discretion of the District Court," *id.* at 25,

91 S.Ct. 1267, held the Supreme Court.[1]

And, in perhaps the most powerful testament of all to the fact that this district court never intended, much less specifically authorized a quota of a type the majority holds today that it did, the School Board itself expressly argued to the Supreme Court of the United States in *Swann* both that Judge McMillan "disclaim[ed] any intent to require racial balancing," Respondent's ***368** Br. at 24, and that the plain language of the district court order dealing with student enrollment ("about or above 20%") actually did not set quotas.[2] Indeed, the Board that before this court argues that racial quotas were authorized by Judge McMillan, argued before the Supreme Court that it was beyond the constitutional authority of the district court to

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[1]In the course of its opinion in *Swann,* the Court stated that a school board, as opposed to a federal court, would possess the discretionary power to direct that its schools maintain "a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 16, 91 S.Ct. 1267. Both Judges Motz and Wilkinson seize upon this passage as if it supported their holding that the School Board's imposition of fixed quotas was permissible. Of course, as even the School Board realizes, this is misplaced reliance, for whether or not the Board possessed independent authority to impose the rigid quotas is entirely irrelevant to the only question before us of whether the Board is entitled to immunity because it was acting upon order of the district court.

[2]The petitioners in *Swann,* like the School Board, also argued that Judge McMillan neither intended nor imposed a quota in his desegregation order. In a construction of the district court's order that not only tracked the order's unambiguous language, but was ultimately adopted by the Supreme Court, petitioners maintained that the court employed the 71% 29% ratio merely as a "starting guide," "a specific, yet flexible goal," "'expressed a willingness to accept a degree of modification,'" and "'departed from it where circumstances required.'" Petitioners' Br., at 36, 38, 66.

impose quotas ("absolutes"), as such would have been based on the district court's own "subjective" notions of right and wrong, not on the mandates of the Constitution, Respondent's Br., at 35, and would violate individual rights guaranteed by the Fourteenth Amendment "of those blacks and whites caught up in the forced mass movement of children away from their neighborhoods." *Id.* at 52, 91 S.Ct. 1267. In an observation that now acquires ironic overtones of its own in light of the School Board's current posture that quotas were authorized by the district court, the Board in *Swann* argued with respect to its position (also rejected by the Supreme Court) that, although not intended by Judge McMillan, his order should nonetheless be construed as effectively requiring racial balancing, that "[i]t is ironic that the counterpart of the compulsion outlawed by *Brown I* and *II* is now employed in the name of the Constitution. Is it trite to suggest that two wrongs do not make a right?" *Id.*

C.

If there were any question as to Judge McMillan's rejection of fixed quotas, and frankly there can be none in the face of Judge McMillan's own disavowal and the Supreme Court's explicit condemnation of such in *Swann,* it was answeredwith equal clarity repeatedly by the district court in orders entered in the wake of *Swann,* in which the court was at obvious and undeniable pains to respect the Supreme Court's injunction that inflexible quotas not be set.

In an order issued the same month after the Supreme Court's decision in *Swann,* Judge McMillan again confirmed that he neither authorized nor permitted strict racial quotas. First, when the School Board asked to close a school to

improve racial balance, Judge McMillan rejected the proposal decisively, finding deviations from targeted percentages an insufficient justification for such action. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 328 F.Supp. 1346, 1348 (1971) (refusing to close a school where the number of white students was less by two percent than that assigned to the school in the beginning of the year and one percent greater "than the proportion called for under the plan"). And in language that belies any contention that the court authorized strict quotas, Judge McMillan rejected a flat ban on any student transfers that would alter the targeted composition of a school, instead ordering only that the School Board could not assign a child to a school or allow that child to attend a school different from the one he was attending at the start of the school year, if "the cumulative result of such assignment in any given period tends *substantially* to restore or to increase the degree of segregation in either the transferor or the transferee school." *Id.* at 1350 (emphasis added).

***369** Two years later, Judge McMillan employed essentially the same carefully crafted language, again distinguishing between "racial identifiability" on one hand and strict quotas on the other, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 362 F.Supp. 1223, 1228-30 (1973), invoking the language of "reasonably stable [pupil distribution]," "substantial [leeway for use of discretion and common sense]," and "[remedy for] gross unfairness [as the 'legitimate target of a court,' as contrasted with 'perfect fairness' which is 'impossible to attain']." *Id.* at 1229, 1231, 1238.

And, finally, in 1974, the district court entered the order that the School Board contends, and Judges Motz and Wilkinson accept, authorized the rigid quotas in dispute.

Contrary to the Board's assertion and my colleagues' belief, however, that order, too, likewise carefully and deliberately preserved the elementary distinction between flexible ratios as a starting point to bring segregation to an end, which the Supreme Court had held were constitutionally permissible, and strict quotas, which the Supreme Court had held were constitutionally impermissible. Retaining just that amount of flexibility essential to the exercise of what the Supreme Court only two years before had admonished was the limit of its constitutional power, Judge McMillan ordered only "[t]hat the optional school enrollments will be controlled starting with 1974 so that they are open to all county residents and have *about or above* 20% black students." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F.Supp. 1102, 1104 (1974) (emphasis added). Fully aware that the Supreme Court had forbidden imposition of quotas, the School Board itself did not even request authorization to impose strict quotas. Tellingly, the Board only submitted for the district court's approval a policy requiring that each school maintain a black student population of "at or above *approximately* 20%." To anyone familiar with the history of the litigation, and especially the Supreme Court's then-recent explicit rejection of any construction of Judge McMillan's orders that would impose a quota on the School Board, as was the School Board, the purposeful distinction between race consciousness and rigid quota drawn by Judge McMillan in his 1974 order could not be any clearer.

III.

Indeed, foregoing the implausible arguments embraced by the majority, not even the School Board seriously argues before us that the district court authorized strict quotas--which

should be unsurprising, given its own argument as early as 1970 that such were unconstitutional and its firsthand knowledge that the Supreme Court had categorically rejected the use of such in this very litigation. To the Board's credit, it does not even attempt the argument made by Judges Motz and Wilkinson that the language of the district court orders itself authorized quotas. Rather than focus on whether the district court orders imposed or authorized rigid quotas, as to which it says nothing, the Board noticeably and notably passes instead to the very different argument that its admission policies were not, as a practical matter, tantamount to insistence upon rigid quotas as evidenced by the ultimate variation in the racial make-up of the magnet schools. *See* Appellants' Reply Br. at 15; Appellants' Br. at 21 (suggesting that the "manner in which CMS admitted students to its magnet schools was fully consistent with these orders and not rigid and inflexible" because of the existence of "[s]ignificant variance" from the initial goal). This "[s]ignificant variance," of course, is not due to the flexibility of the admissions process, but instead to its rigidity to the extent of leaving unfilled seats that were reserved for a particular race, even in the face of a ***370** waiting list of students of different races. In any event, the ultimate demographics have no relevance whatever to the threshold question before us of whether the district court did or did not specifically authorize the Board to employ rigid quotas in admissions to its magnet schools--a question as to which the School Board's silence speaks volumes.

IV.

The facts of the repeated explicit and consistent rejection of quotas by this district court in this very litigation for over thirty years; the categorical rejection by the Supreme

Court of the United States of any construction of the district court's orders that would require rigid quotas; the School Board's own argument before the Supreme Court in *Swann* that rigid quotas were never intended or ordered by the district court, and that, if they had been, such would be unconstitutional; and the Board's tacit (and frankly, candid, if indirect) concession in its briefs before this court that the district court did not authorize rigid quotas, renders beyond any argument the plaintiff's contention that the School Board acted outside the scope of the district court's orders when it adopted rigid quotas and refused to permit students to compete for open seats based upon their race alone. Not merely had the district court never authorized the School Board's use of rigid quotas. It had expressly stated that it would not do so, as the Board itself knew well. And, if this alone were not enough, at this very School Board's behest, the district court had been instructed by no less an authority than the Supreme Court of the United States that it would have been without the constitutional power to impose such an inflexible requirement on the county officials of Charlotte- Mecklenburg, even had it wanted to. The holding on this record that the district court authorized the use of strict quotas is, as best evidenced by the palpable lack of support summoned by the combined opinions of Judges Motz and Wilkinson on behalf of that holding, simply insupportable.

"The cumulative message of innumerable court orders conveyed to the Charlotte-Mecklenburg board over the course of many years" actually was not, as Judge Wilkinson asserts, "to do everything possible to desegregate Charlotte schools." *Post* at 366. It was to do "everything possible" to desegregate Charlotte-Mecklenburg's schools, *except employ strict racial quotas.*

DIANA GRIBBON MOTZ & KING, Circuit Judges:

A majority of the Court today reverses the district court's finding that the use of a race-based admission policy by the Charlotte-Mecklenburg Board of Education ("CMS" or "Board") in its expanded magnet schools program violated the Equal Protection Clause of the Constitution of the United States--and thus vacates the attendant injunction, monetary relief, and attorney's fees award. Every significant aspect of the expanded magnet schools program, including the use of racial proportions in assigning students to magnet schools, was authorized by the judicial desegregation orders governing this case. The Board's obligation to obey these court orders insulates it from constitutional attack for actions taken in compliance with them. It would be the rankest injustice to find the Board liable for a constitutional violation, and subject to monetary damages and enormous attorney's fees, when its expanded magnet schools program was simply a good-faith attempt to comply with the desegregation orders imposed by federal courts to remedy an unlawful dual school system. Thus, for the reasons *371 more fully explained in parts III, IV, V, and VI of this opinion, the magnet schools ruling must be reversed and the accompanying injunction, monetary damages, and attorney's fees award must be vacated.

However, a separate majority severely errs in upholding the district court's determination that CMS has achieved unitary status. This majority expresses its "satisfaction that CMS has dismantled the dual school system." Traxler Op. at 7. For the reasons set forth in parts II and VIII of this opinion, no one should be satisfied at this time. Nothing yet demonstrates that CMS has eliminated all vestiges of the unlawful discrimination

that has long permeated its school system. In holding to the contrary, the majority has only succeeded here in dashing the hopes of the citizens of Mecklenburg County, particularly those of African-American descent, who have long fought for the fair and equitable implementation of the desegregation plan approved by Judge McMillan some thirty years ago. These successive generations of parents and children have been slowly starved by a well-meaning--but irresolute--governing body, whose sins have been absolved by the court below (and now by a majority of this Court) without anything but the most cursory examination. Although CMS has clearly achieved unitary status in certain respects, there remain several areas of primary concern that have not been subjected to anything approaching a proper constitutional analysis. We deplore, and believe the Court itself may one day regret, the refusal of a present majority to recognize this.

I.

A.

In order to better understand the issues presented in this case, we must briefly review our country's history of school desegregation litigation, in which CMS has played a prominent role.

Even after slavery had been abolished for almost a full century, African- American children were, for the most part, either excluded from the public schools or educated separately from white children. "In fact, any education of Negroes was forbidden by law in some states." *Brown v. Bd. of Educ.*, 347 U.S. 483, 490, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("*Brown I*"); *see also Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475

F.Supp. 1318, 1324 (W.D.N.C.1979) ("For three centuries racial segregation was the law of the land."). Indeed, throughout the early part of the 1900s, CMS operated a segregated school system within the safe harbor created by the Supreme Court's doctrine of "separate but equal" articulated in *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

In the middle of the 1900s, the Supreme Court began dismantling the great wall of segregation constructed under the imprimatur of *Plessy.* The Court initially sought to determine whether various "separate" African-American schools were genuinely "equal" to white schools by evaluating the quality of physical facilities, curricula, faculty, and certain "intangible" considerations. *See, e.g., Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *Sipuel v. Board of Regents of Univ. of Okla.,* 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948). In each instance, the Court concluded that they were not. *Id.*

In 1954, the Supreme Court at last overruled *Plessy,* declaring that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown I,* 347 U.S. at 495, 74 S.Ct. 686. Just one year later, the Court mandated that federal courts and school authorities take affirmative steps to achieve desegregation. ***372** *Brown v. Bd. of Educ.,* 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) ("*Brown II*"). Specifically, federal courts were to retain jurisdiction over desegregation cases during the period of transition, wielding their equitable powers to supervise school boards' efforts to effectuate integration. *Id.* at 300-01, 75 S.Ct. 753. One of the most important obligations of the federal courts was to ensure that

school boards were proceeding in good faith to desegregate the public schools "with all deliberate speed." *Id.* at 301, 75 S.Ct. 753. With these seminal decisions--*Brown I* and *Brown II*--the Supreme Court promised the citizens of this country, and particularly African-American children, school systems "in which all vestiges of enforced racial segregation have been eliminated." *Wright v. Council of the City of Emporia,* 407 U.S. 451, 463, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972).

Notwithstanding the Court's repeated admonition that segregation and its vestiges be eliminated "root and branch," *Green v. County Sch. Bd. of New Kent County,* 391 U.S. 430, 437-38, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), many school boards--CMS included--adopted "an all too familiar" response to the mandate of *Brown II,* interpreting "all deliberate speed" "as giving latitude to delay steps to desegregate." *Freeman v. Pitts,* 503 U.S. 467, 472, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). And so, lower federal courts, with the guidance and oversight of the Supreme Court, began fashioning equitable remedies to contend with school board recalcitrance. For example, in *Green,* the Supreme Court held that a "freedom of choice" plan, which permitted students--regardless of race--to choose the school they would attend, was by itself insufficient to meet the mandate of *Brown.* 391 U.S. at 430, 88 S.Ct. 1689. In so holding, the Court recognized that more intensive efforts would be necessary in order to make "meaningful and immediate progress toward disestablishing state-imposed segregation." *Id.* at 439, 88 S.Ct. 1689. Subsequently, in this very case, the Court approved significant federal court intervention into a school system in order to eliminate segregation "root and branch," including the busing of students from schools close to their homes to schools farther away, the use of race-based "mathematical ratios," and the alteration of

student attendance zones. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 25, 28, 30-31, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

The Supreme Court has made clear, however, that a federal court's "end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Freeman*, 503 U.S. at 489, 112 S.Ct. 1430. Hence, as a school system eliminates the vestiges of past official segregation from certain facets of its operations, courts possess the authority to relinquish supervision in a commensurate fashion. *Id.* at 489-91, 112 S.Ct. 1430.

In this context, we examine the steps taken by CMS to eliminate the vestiges of segregation.

B.

1.

North Carolina's most significant initial response to the mandate of *Brown II* was the "Pupil Assignment Act of 1955-56, under which [the Board had] the sole power to assign pupils to schools, and children [were] required to attend the schools to which they [were] assigned." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F.Supp. 1358, 1361 (W.D.N.C.1969). This was an ineffectual measure--perhaps intentionally so--and by 1964, no more than *373 a few dozen (out of more than 20,000) African-American children in CMS were attending schools with white children. *Id.* at 1362.

In 1965, the parents of African-American children attending CMS (hereinafter the "*Swann* plaintiffs")[1] filed a class action seeking injunctive relief, claiming that the Board's policies and practices were perpetuating a segregated school system. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 243 F.Supp. 667, 668 (W.D.N.C.1965). On July 14, 1965, the district court approved a Board-proposed plan that closed certain black schools, built new schools, and established school attendance zones based on neighborhoods. But the linchpin of this plan was its grant of permission to each student--regardless of race-- to freely transfer to a different school (often described as a "freedom of choice" plan). *Id.* In approving this plan, the district court held that CMS had no affirmative duty to "increase the mixing of the races"; instead, the Board's obligation under *Brown II,* according to the court, was to act without the intent to perpetuate segregation. *Id.* at 670. The following year, this Court affirmed the district court's interpretation of *Brown II*. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 369 F.2d 29, 32 (4th Cir.1966) ("Whatever the Board may do in response to its own initiative or that of the community, we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of the races in the school population.").

However, in the wake of the Supreme Court's 1968 decision in *Green,* which struck down a desegregation plan

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[1]Since this case was first filed in 1965, the various successor plaintiffs have been referred to as the *Swann* plaintiffs, a practice we continue to observe here.

founded predominantly on "freedom of choice," it became clear that school boards did possess an affirmative obligation to desegregate, not merely an obligation to implement race-neutral policies. *Green*, 391 U.S. at 437-38, 88 S.Ct. 1689. Invigorated by the developing law, the *Swann* plaintiffs promptly filed a motion for further relief with the district court, seeking to expedite the desegregation process.

3.

In 1969, Judge James B. McMillan, newly assigned to the *Swann* case,[2] reexamined the Board's actions in light of *Green* and determined that its "freedom of choice" plan, when coupled with geographic zoning, were "not furthering desegregation." 300 F.Supp. at 1372. On the fundamental matters of assigning students and faculty, and the siting of new schools, the court made the following findings:

- *Student assignment:* The court noted that a ratio of seventy percent white students to thirty percent black students, which approximated the ratio of white to black students in the county, tended to aid "better students [in holding] their pace, with substantial improvement for the poorer students." *Id.* at 1369.

- *Faculty assignment:* Although faculty members were not being assigned with a discriminatory purpose, there was also "no sustained effort to desegregate faculties." *Id.* at 1370. The court ordered CMS to work actively to integrate the faculties, so that "a child attending any

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[2]For clarity's sake, we will often refer within to the presiding district judge by name.

*374 school in the system will face about the same chances of having a black or a white teacher as he would in any other school." *Id.*

- *School siting:* The court underscored that the desirability of implementing a "neighborhood school" policy, under which efforts were made to locate schools in neighborhoods and within walking distance for children, could not override the constitutional duty to desegregate. *Id.* at 1369. At the same time, CMS was not to avoid locating new facilities in black neighborhoods. *Id.* at 1371.

In light of *Green,* Judge McMillan also ordered CMS to submit a new, amended desegregation plan, and he outlined certain possible remedies, including busing and re-zoning. *Swann,* 300 F.Supp. at 1360; *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 306 F.Supp. 1299, 1302 (W.D.N.C.1969).

Once again, however, CMS was slow to respond, prompting Judge McMillan to impose a deadline of August 4, 1969, by which the Board was to submit a detailed desegregation plan to the court. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 300 F.Supp. 1381, 1382, 1386 (W.D.N.C.1969). CMS complied, and its proposed desegregation plan appeared to accept, for the first time, the constitutional duty to desegregate students, teachers, principals, and staffs " 'at the earliest possible date.' " *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 306 F.Supp. 1291, 1293 (W.D.N.C.1969). The Board's proposed desegregation plan, approved by the district court on an interim basis ("interim desegregation plan"), included programs for faculty desegregation, the closing of seven all-black schools, and the

reassignment of pupils from the closed schools to outlying, predominantly white schools. *Id.* at 1298-99. In approving the plan on an interim basis, the district court noted that black children were bearing a disproportionate burden of the desegregation efforts, but the court nonetheless concluded that some action-- even if interim--was preferable to none at all. *Id.* at 1298. Judge McMillan also ordered the Board to submit another desegregation plan within three months.

In November and December 1969, the district court determined that the school system's compliance with the interim desegregation plan was unsatisfactory, finding that the Board was continuing to perpetuate segregation:

> The School Board is sharply divided in the expressed views of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools. By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they *intend not to do* it effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

Swann, 306 F.Supp. at 1306. At that time, the district court also reviewed and rejected the Board's newly submitted amended desegregation plan. *Id.* at 1313-14. Then, the court appointed Dr. John A. Finger, Jr. as an expert consultant to prepare a more acceptable plan. This appointment came nearly

two years after the Supreme Court's *Green* decision and more than fifteen years after Brown I.

The district court ultimately adopted Dr. Finger's proposed plan for elementary schools and the Board's plan, as modified by Dr. Finger, for secondary schools (collectively ***375** the "Finger Plan"). *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F.Supp. 265, 268-70 (W.D.N.C.1970). In doing so, the court again observed the Board's failure to make an effective beginning to desegregation: "The School Board, after four opportunities and nearly ten months of time, have failed to submit a lawful plan (one which desegregates all the schools). This default on their part leaves the court in the position of being forced to prepare or choose a lawful plan." *Id.* at 267.

The Finger Plan included several components. First, students were to be assigned "in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." *Id.* at 268. Second, "no school [could] be operated with an all- black or predominantly black student body." *Id.* Third, in redrawing the school system's attendance zones, the Board was authorized to use bus transportation and noncontiguous "satellite zones"[3]

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[3]CMS used "satellite zones" in connection with elementary schools. Under this method, students from a small geographic area located outside an elementary school's primary attendance area were assigned to that school. J.A. 15571, 16052; *see also Swann*, 402 U.S. at 9 & n. 3, 91 S.Ct. 1267. The use of satellite zones was implemented by "pairing" elementary schools--students from a predominantly black neighborhood were bused to a school in a predominantly white neighborhood for grades K-3, and students from a predominantly white neighborhood were bused to a school in a predominantly black neighborhood for grades 4-6. J.A. 15571, 16052; *see also Swann*, 402 U.S. at 9-10, 91 S.Ct. 1267.

to accomplish its goals. *Id.* Fourth, the district court restricted the student transfer policy in order to safeguard against resegregation. *Id.* at 268-69. Fifth, the race of faculty members at each school had to approximate the ratio of black and white faculty members throughout the system. *Id.* at 268. Sixth, the overall competence of teachers at formerly black schools could not be inferior to those at formerly white schools. *Id.* Finally, the district court mandated that the Board monitor and report on its progress in implementing the plan. *Id.* at 269.

The Finger Plan was challenged on several occasions and, in 1971, the Supreme Court upheld it as a valid exercise of the district court's equitable powers. *Swann,* 402 U.S. at 31-32, 91 S.Ct. 1267. Indeed, the Court specifically found that the district court's adoption of a student assignment plan that used race-based "mathematical ratios" as a starting point was well within the court's "equitable remedial discretion." *Id.* at 25, 91 S.Ct. 1267.

Even after the Supreme Court's decisionin *Swann,* the district court found that the Board's desegregation efforts failed to meet constitutional requirements. For example, Judge McMillan ordered student assignment proposals revised in June 1971, finding that the proposals "were discriminatory in detail and in overall result; they placed increasing burdens upon black patrons while partially relieving white patrons of similar burdens." *Swann v. Charlotte- Mecklenburg Bd. of Educ.,* 328 F.Supp. 1346, 1347 (W.D.N.C.1971). During the 1971-72 and 1972-73 school years, the district court attempted a "hands-off" approach, leaving the Board to remedy problems as they arose, but the court twice found that the Board still had not adopted sufficient measures to guard against resegregation and ensure that whites were bearing an appropriate share of the

desegregation burden. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 362 F.Supp. 1223, 1230 (W.D.N.C.1973); *Swann v. Charlotte- Mecklenburg Bd. of Educ.*, 379 F.Supp. 1102 (W.D.N.C.1974); *see also* discussion of specific findings *infra*.

***376** The 1974 order expressed somewhat more optimism about the Board's desegregation efforts. In that order, Judge McMillan approved a student assignment proposal that, if implemented properly, would result in "a fair and stable school operation" and would permit the court to close the case as an active matter. *See* 379 F.Supp. at 1103. The proposal made provisions for several "optional schools"--schools that would offer some specialized program or curriculum and thereby attract students of all races from across Charlotte and Mecklenburg County. Although Judge McMillan approved the incorporation of these schools into the plan, he cautioned that the optional schools would be inconsistent with the school board's constitutional obligations if they merely served to re-institute "freedom of choice." *Id.* at 1104 (" 'Freedom of choice' was a synonym for segregation for many years, and ... it should not be resurrected at this late date sub nom. 'optional schools' without adequate safeguards against discriminatory results."). To ensure that the optional schools served their stated purpose of furthering the process of desegregation, Judge McMillan decreed that "optional school enrollments will be controlled starting with 1974 so that they ... have about or above 20% black students." *Id.*

Finally, in July 1975, over twenty years after the mandate of *Brown II*, Judge McMillan for the first time observed, albeit with reservations, that the Board was actually working toward desegregation: "The new Board has taken a more positive attitude toward desegregation and has at last

openly supported affirmative action to cope with recurrent racial problems in pupil assignment." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 67 F.R.D. 648, 649 (W.D.N.C.1975). Although the district court cautioned that problems remained, the new vigor with which the Board was pursuing desegregation persuaded Judge McMillan to close *Swann* as an active matter of litigation and to remove it from the court's docket. *Id.* at 649-50. In so acting, the court reaffirmed that its orders still stood: "[t]his case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed." *Id.* at 649.

4.

Between 1975 and 1992, two significant actions were taken in connection with the CMS desegregation litigation.

a.

First, in 1978, a group of white parents and children brought suit against CMS, seeking an order prohibiting the Board from assigning children pursuant to the Board's latest student-assignment plan. *See Martin*, 475 F.Supp. at 1320. The *Martin* plaintiffs claimed that the Supreme Court's then-recent decisions in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), and *University of Cal. Regents v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), prohibited any consideration of race in student assignment. 475 F.Supp. at 1321. The *Swann* plaintiffs intervened in *Martin*, joining the Board's opposition to the contentions of the *Martin* plaintiffs. *Id.*

A brief review of *Spangler* and *Bakke* is necessary to an understanding of *Martin*. In *Spangler*, the Supreme Court held that because the Pasadena Unified School District ("PUSD") had achieved racial neutrality in its school attendance pattern, "the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity." 427 U.S. at 436, 96 S.Ct. 2697. All parties in *Spangler* agreed *377 that the plan initially achieved racial neutrality in student attendance; nonetheless, the district court had believed it was empowered to annually readjust school boundaries to ensure in perpetuity that there would be no majority of any minority race at any Pasadena school. *Id.* at 433, 436, 96 S.Ct. 2697. In *Bakke*, the Supreme Court determined that a public university with no history of discrimination could not constitutionally reserve sixteen out of one hundred admission slots for racial minorities. 438 U.S. at 319-20, 98 S.Ct. 2733. In striking down this admissions plan, the Court had made clear that "[w]hen a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, [it must] be regarded as [constitutionally] suspect." *Id.* at 305, 98 S.Ct. 2733.

Judge McMillan, who retained jurisdiction over *Swann* and presided over *Martin*, first held that because CMS had not achieved racial neutrality in student attendance, consideration of race in student assignment policies was appropriate under *Swann*. *See Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 626 F.2d 1165 (4th Cir.1980). He explained that because the student assignment policy in the CMS school system had been independently adopted *by the Board*, it was not established, as the *Spangler* policy had been, via judicial coercion or order. 475 F.Supp. at 1340-43. Second, Judge McMillan ruled that

Bakke was inapposite to the claims of the *Martin* plaintiffs. Specifically, the court reasoned that no child was being denied access to equal educational opportunity because of race, *see id.* at 1321, and the actions of the Board were therefore not constitutionally suspect under *Bakke*.

In upholding the independent actions of the Board, Judge McMillan made several important findings. For example, he found that discrimination had not ended; indeed, it was this very finding that led the court to uphold the 1978 race-conscious student assignment policy. *Id.* at 1346-47. Also, although for the first time the district court praised the efforts of the Board without reservation, it underscored yet again the need for patience and continued efforts:

> It took three centuries to develop a slave culture, to fight a bloody civil war, and to live through the century of racial turmoil after that war.
>
> * * * * * *
>
> The culture and attitudes and results of three centuries of segregation cannot be eliminated nor corrected in ten years. Human nature and practices don't change that fast, even in the hands of people of good will like the members of the present School Board. They need time to work their own experiments, and to find their own ways of producing the sustained operation of a system of schools in which racial discrimination will play no part. I vote to uphold their efforts to date, and to give them that time.

Id. at 1347. In 1980, we affirmed the district court's decision in *Martin*. *See* 626 F.2d at 1165.

b.

The second significant phase of litigation between 1975 and 1992 was initiated in 1980. At that time, CMS and the *Swann* plaintiffs notified the district court that the black student population in CMS elementary schools had grown from twenty-nine percent to forty percent, making it increasingly difficult to comply with the desegregation order's mandate to avoid majority-black elementary schools. In response to this change, Judge McMillan approved a modification to the desegregation plan. Instead of prohibiting a "predominantly ***378** black student body," the court permitted CMS to operate elementary schools with a black student population of "plus 15 percent" above the district-wide average. Thus, if the school district averaged forty percent black students, any individual school could have fifty-five percent black students.

5.

From 1981 to 1992, the Board continued to operate its desegregation plan as approved by the district court, focusing, *inter alia,* on satellite attendance zones, a feeder plan (assigning middle-school students from a certain neighborhood to identified high schools), school closings, and construction of new schools. Then, in 1992, CMS substantially increased its reliance on "optional" or magnet schools (the "expanded magnet schools program"). The Board placed new emphasis on magnet schools in order to phase out "pairing" and heavy reliance on busing, and to give parents more choice in school selection. It was the expanded magnet schools program that ultimately led to the present phase of this litigation.

6.

In September 1997, William Capacchione, individually and on behalf of his daughter Cristina, sued CMS claiming that Cristina was unconstitutionally denied admission to a magnet school. Christina is Hispanic and Caucasian, and her suit under 42 U.S.C. § 1983 sought declaratory, injunctive, and compensatory relief. In response, CMS moved to dismiss Capacchione's suit and, almost simultaneously, the *Swann* plaintiffs moved to reactivate *Swann,* claiming that CMS was not yet in compliance with past desegregation orders and had not yet achieved unitary status. Because Judge McMillan had died, the cases were assigned to Senior Judge Robert D. Potter, who restored *Swann* to the district court's docket, consolidated the cases, denied CMS's motion to dismiss, and granted Capacchione's motion to intervene.[4]

The *Capacchione* plaintiffs claimed that CMS had long since eliminated the vestiges of segregation in its schools, and that its formerly dual system of white and black schools had, for some time, been unitary. They also contended that CMS, while still operating under the court's desegregation orders, had

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[4]Since filing suit, the Capacchiones have moved to California. Based on that fact and other findings, the district court determined that William Capacchione no longer possessed standing to seek injunctive or declaratory relief, but that he did have standing to pursue compensatory relief. *Capacchione v. Charlotte-Mecklenburg Schs.*, 57 F.Supp.2d 228, 240 (W.D.N.C.1999). Another group of white parents intervened in the consolidated action and that group, represented by plaintiff Michael Grant, claimed that CMS has achieved unitary status. The various groups of plaintiffs that have joined in Capacchione's claims are hereinafter referred to as "the *Capacchione* plaintiffs."

violated those orders and the constitutional rights of white students in its efforts to desegregate the school system by employing a race- conscious assignment lottery in its expanded magnet schools program. The *Swann* plaintiffs countered that the school system had not yet achieved unitary status. CMS acknowledged that it was not yet in compliance with past desegregation orders and agreed that it should not be declared to have achieved unitary status. CMS also contended that, in any event, the expanded magnet schools program constituted an entirely constitutional and appropriate integration tool authorized under the desegregation orders in this case. The *Swann* plaintiffs, while endorsing the concept of magnet schools, argued that the expanded magnet schools program, as implemented, ***379** was contributing to the resegregation of the school system.

Following a bench trial conducted from April 19 to June 22, 1999, the court, on September 9, 1999, filed its Memorandum of Decision and Order, from which this appeal is taken. *See Capacchione v. Charlotte-Mecklenburg Schs.*, 57 F.Supp.2d 228 (W.D.N.C.1999). Although the Board claimed that unitary status had not been achieved, the district court found that it had. In its ruling, the district court then found that the Board's expanded magnet schools program, even though instituted to effect court-ordered desegregation, was unconstitutional. Furthermore, the court enjoined the Board from "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race." *Id.* at 294. Finally, the court awarded the *Capacchione* plaintiffs nominal monetary damages and substantial attorney's fees.

C.

The Board and *Swann* plaintiffs appealed every portion of the district court's judgment. A panel of this Court, with one judge dissenting, vacated and remanded the district court's unitary status determination, holding that the district court's unitary status findings were insufficient with respect to student assignment, facilities, transportation, and student achievement. The panel also reversed the district court's holding that the expanded magnet schools program violated the Equal Protection Clause, reasoning that the program complied in all respects with court orders governing the case and did not in any way violate the Constitution. Finally, the panel vacated the district court's injunction, the award of nominal damages, and the award of attorney fees. *See Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir.2000). Thereafter, on January 17, 2001, a majority of the active members of the Court voted to hear this case en banc.

II.

We first address the district court's unitary status decision. The determination of whether any part of a school system has achieved unitary status is a factual one; therefore, the district court's findings as to unitary status are reviewed for clear error. *See Riddick v. School Bd. of the City of Norfolk*, 784 F.2d 521, 533 (4th Cir.1986); *see also Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 952 n. 3 (11th Cir.1989) (citing *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. Unit A 1981)). No deference, however, is owed to the district court on conclusions of law, including the district court's understanding of controlling law or the various burdens of proof and

presumptions; consequently, all such conclusions of law are reviewed de novo. *See, e.g., In re Brice,* 188 F.3d 576, 577 (4th Cir.1999).

A.

1.

Indisputably, the school system of Charlotte-Mecklenburg County subjected African-Americans to nearly a century of segregation and discrimination. Indeed, the Supreme Court recognized as much in *Swann,* noting that North Carolina was one of the states with "a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." 402 U.S. at 5-6, 91 S.Ct. 1267. In this context the remedies forcefully endorsed in *Brown II,* including the use of race-conscious measures, are necessary to ***380** eradicate the invidious segregation at which they are aimed.

Moreover, court supervision over local school boards, also embraced in *Brown* and its progeny, is entirely appropriate whenever "school authorities fail in their affirmative obligations" "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated." *Swann,* 402 U.S. at 15, 91 S.Ct. 1267. Not only are the federal courts entitled to supervise and direct the actions of local school boards under those circumstances, but the scope of federal authority is almost plenary: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.*

There is no doubt that CMS was justifiably subjected to federal court supervision; in fact, even after the Board had been subjected to court supervision, it had to be repeatedly ordered to begin the process of desegregation.

Ultimately, however, the goal in a desegregation case such as this is to reach the point at which federal supervision is no longer warranted and the use of race-conscious measures is no longer necessary. *See Freeman,* 503 U.S. at 489, 112 S.Ct. 1430. The Supreme Court has identified six factors (collectively the "original *Green* factors") that must be free from racial discrimination before the mandate of *Brown* is met: (1) student assignment, (2) physical facilities, (3) transportation, (4) faculty, (5) staff, and (6) extracurricular activities. *Green,* 391 U.S. at 435, 88 S.Ct. 1689. Not only are reviewing courts to ascertain whether these original *Green* factors are free from racial discrimination, but courts also are entitled, in their discretion, to identify other factors ("ancillary factors")[5] and "determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to ensure full compliance with the court's decree." 503 U.S. at 492, 112 S.Ct. 1430.

2.

For school systems proceeding through the difficult process of desegregation, the Supreme Court has adopted the goal of achieving unitary status. *Freeman,* 503 U.S. at 486-87, 112 S.Ct. 1430; *Board of Educ. of Okla. City v. Dowell,* 498 U.S. 237, 245-46, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991).

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[5]For convenience, we refer to the original *Green* factors and any ancillary factors identified by the district court as "*Green* factors."

Although prior to the Court's *Dowell* and *Freeman* decisions federal courts used the term "unitary status" somewhat inconsistently, *see Freeman,* 503 U.S. at 486-87; *Green,* 391 U.S. at 437-38, 88 S.Ct. 1689, the term has now come to mean that the school system has been unified such that the vestiges of segregation have been eliminated to the extent practicable. *Freeman,* 503 U.S. at 487, 112 S.Ct. 1430; *Green,* 391 U.S. at 437-38, 88 S.Ct. 1689. When a school system achieves unitary status, federal courts must withdraw supervision over the local school board.

In this case, Judge Potter declared that CMS had achieved unitary status in every respect. The Supreme Court has directed that an appellate court review a district court's unitary status determination by applying a two-part inquiry (the "*Freeman* inquiries"). An appellate court must determine if (1) a school Board has, in good faith, complied with the desegregation decree since it was entered; and (2) the ***381** vestiges of *de jure* segregation in the school system have been eliminated to the extent practicable. *See Freeman,* 503 U.S. at 492, 112 S.Ct. 1430 (citing *Dowell,* 498 U.S. at 249-50, 111 S.Ct. 630).

If the party seeking a declaration of unitary status cannot demonstrate that the school system has achieved unitary status in its entirety, we then undertake to determine whether the school system has achieved unitary status with respect to one or some of the *Green* factors ("partial unitary status"). At that point, we apply, with respect to each *Green* factor, the two *Freeman* inquiries along with one additional *Freeman*-mandated inquiry: "whether retention of judicial control [over one aspect of the school system] is necessary or practicable to achieve compliance with the decree in other

facets of the school system." *Freeman,* 503 U.S. at 491, 112 S.Ct. 1430. This third *Freeman* inquiry recognizes that the *Green* factors are-- to a great extent--interrelated, and when determining whether judicial supervision over a school board may be withdrawn, the overlap between the *Green* factors is a crucial consideration.

The *Freeman* analysis brings us to the most difficult questions presented in any desegregation case: whether present racial isolation is a vestige of past segregation and, if so, whether a school board can practicably reduce that racial isolation. It is even difficult to define "vestige" in this context. *See id.* at 502 (Scalia, J., concurring) ("We have never sought to describe how one identifies ... a 'vestige' or a 'remnant' of past discrimination...."). The vestiges "that are the concern of the law may be subtle and intangible but nonetheless they must be so real that they have a causal link to the de jure violation being remedied." *Id.* at 496, 112 S.Ct. 1430 (Kennedy, J.); *see also id.* at 512, 112 S.Ct. 1430 (Souter, J., concurring) (citing *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 465 & n. 13, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) and *Keyes v. School Dist. No. 1, Denver,* 413 U.S. 189, 211 & n. 17, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973)) (court must order affirmative remedy where school board's conduct "create[d] or contribute[d] to" racial identifiability of schools). We adhere to the most common-sense meaning of "vestige": it is a condition or occurrence causally related to the former de jure system of segregation.

Because a school system's duty to eliminate such vestiges is restricted by the availability of practicable measures for doing so, *see Freeman,* 503 U.S. at 492, 112 S.Ct. 1430, it is also incumbent on us to consider practicability. In

determining the practicability of further measures, the district court must look to numerous indicia of the system's operation. Practicability depends on the feasibility of the proposed method, from both a financial and an administrative perspective. *Cf. id.* at 481-83, 493-97, 112 S.Ct. 1430. Whether a measure is practicable also depends on whether it is "directed to curing the effects of the specific violation," and whether it is likely to do so. *Id.* at 497, 112 S.Ct. 1430.

Our duty, in reviewing Judge Potter's decision, *see Capacchione,* 57 F.Supp.2d at 228, is clear. We must examine each *Green* factor and ascertain whether unitary status has been achieved with respect to any or all of them. Because the district court declared the entire CMS school system to have achieved unitary status, we must assess, with respect to each *Green* factor, whether the Board has complied, in good faith, with the desegregation decree and whether the vestiges of segregation have been eliminated to the extent practicable. *See Freeman,* 503 U.S. at 492, 112 S.Ct. 1430 (citing *Dowell,* 498 U.S. at 249-50, 111 S.Ct. 630). If the school system has not achieved unitary status in its entirety, ***382** then, consistent with *Freeman,* we also must weigh the degree of interrelatedness existing between the various *Green* factors.

B.

By way of introduction to our analysis of this case, we first address a fundamental flaw in the district court's proceedings--a flaw arising from the district court's failure to give any consideration to a remedial plan sought to be admitted as evidence by CMS. Following the filing of the *Capacchione* plaintiffs' Complaint in Intervention, the Board undertook to produce a comprehensive analysis of whether vestiges of de

jure segregation existed in CMS and whether any such vestiges could be practicably remedied. The Board analyzed available data and identified several vestiges remaining; then, in line with the mandate of *Freeman*, the Superintendent of CMS developed a plan containing practicable remedial steps. The Board independently reviewed this plan and, on March 30, 1999, adopted the "Charlotte-Mecklenburg Schools' Remedial Plan to Address the Remaining Vestiges of Segregation" (the "Plan" or "Remedial Plan"). J.A. 11029.

Consistent with pretrial deadlines, CMS filed the Remedial Plan with the district court as a potential exhibit at trial. J.A. 11028. At the pretrial conference conducted on April 13, 1999, the *Capacchione* plaintiffs moved in limine to exclude the Remedial Plan. In essence, the *Capacchione* plaintiffs maintained that the trial had been bifurcated into two phases and that only unitary status was at issue in the first phase. They further maintained that the Remedial Plan contained proposed remedies that could only be implemented if CMS was determined not to have achieved unitary status. Because the unitary status question had not yet been resolved, they claimed that the Remedial Plan (which the *Capacchione* plaintiffs characterized as a damages report) was irrelevant.

In opposing exclusion of the Remedial Plan, CMS and the *Swann* plaintiffs relied on the Supreme Court's *Freeman* analysis. J.A. 1421. Specifically, they asserted that each unitary status determination encompassed in the first phase of the trial turned on "whether the vestiges have been remedied *to the extent practicable.*" *Id.* (emphasis added). The Remedial Plan, they claimed, was not merely relevant, but crucial, to establishing both the existence of vestiges of segregation and the practicability of remedial measures.

Judge Potter responded with two rulings. First, Judge Potter explained in assessing whether CMS had achieved unitary status that he believed *Freeman* required him to consider just one thing: "only ... what CMS has done, not what it may do in the future." *See* Order of April 14, 1999 at 4. Second, based on this understanding of *Freeman* and the unitary status test, Judge Potter concluded that the Remedial Plan was irrelevant: "If the Court later determines that additional remedial measures are needed, it may consider the plan. Until that time comes, however, the Court will not get mired in the complex details and mechanics of a proposed plan." *Id.* at 5.[6]

*383 We believe Judge Potter erred in both of these rulings. First, he misapprehended *Freeman* and its test for unitary status. At the outset, *Freeman* explicitly rejects, as a matter of law, the very analysis adopted by the district court. That is, under *Freeman,* a district court must consider (1) compliance with prior orders (*i.e.*, "what CMS has done"), *and* (2) whether vestiges have been eliminated to the extent practicable (*i.e.*, "what [CMS] may do in the future"). *See*

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[6]Judge Potter also chided CMS for proffering the Remedial Plan "after the deadline for fact discovery and expert witness discovery had expired." On the contrary, CMS fulfilled all of its duties under the federal rules, appropriately supplementing its responses to discovery requests as soon as the Remedial Plan had been adopted. Furthermore, a more precipitant proposal could not have incorporated the various expert perspectives developed during discovery. A similar plan submitted earlier in the course of the litigation necessarily would have been based largely on speculation and supposition, and therefore would have been far less useful and pertinent. As it was, the Plan was tendered in advance of the non-jury trial, and, of great significance, almost five months before the district court issued its decision. Neither the court nor the parties could have been inconvenienced by the necessary timing of the Remedial Plan's submission.

Freeman, 503 U.S. at 491, 112 S.Ct. 1430; *see also* Order of April 14, 1999 at 4. By construing *Freeman*'s unitary status test to include the former ("what CMS has done") but not the latter ("what [CMS] may do in the future"), Judge Potter erred as a matter of law.

The Remedial Plan directly addresses the latter inquiry, and it does so in an apt, informed manner, relying on the considered opinions of highly capable professionals retained to analyze the latest available data. In other words, the district court's second reason for excluding the Plan--relevancy--also fails to withstand scrutiny.[7] There is no doubt that Judge Potter had wide discretion on this issue, but relevancy is a fluid concept under the Federal Rules of Evidence. *See* Fed.R.Evid. 401 (defining relevant evidence as "having any tendency to make the existence" of any material fact "more probable or less probable than it would be without the evidence"). Consequently, relevancy typically presents a rather low barrier to admissibility. *See, e.g., United States v. Van Metre,* 150 F.3d 339, 349 (4th Cir.1998) (citing *United States v. Powers,*

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[7]Taking the district court at its word that the only question before it initially was the extent of the Board's compliance with the prior desegregation orders, the Remedial Plan was nonetheless highly relevant for even that purpose. The ease with which some of the proposed Plan remedies could be realized, *e.g.,* merely distributing available funding to address the stark disparity in basic resources such as instructional materials and media centers, *see* J.A. 11040, strongly suggests that the Board had not fully implemented the long-standing dictates of the prior orders. The court nonetheless observed that "while the goal of perfect compliance with court orders has remained elusive, no evidence has been presented that school authorities were guilty of easily correctable errors." *Capacchione,* 57 F.Supp.2d at 283. To the contrary, the Plan thoroughly documented the Board's failings and the facility with which they could be rectified. The district court simply chose to ignore this highly relevant evidence.

59 F.3d 1460, 1465 (4th Cir.1995)).

However, we need not rely on the minimal threshold encompassed in the test for relevancy because this Remedial Plan would be relevant under any reasonable test. The Remedial Plan identified record evidence (including the deposition testimony of several experts) supporting the Board's belief that vestiges of de jure segregation in CMS remain apparent in (1) faculty assignment and quality, (2) physical facilities and the allocation of instructional resources, (3) student achievement, and (4) student assignment. More importantly, the Remedial Plan detailed specific steps that the Board proposed to undertake over the course of the ensuing five years "with a goal of achieving unitary status at that time." J.A. 11029.

Without a doubt, federal courts possess the final word in deciding whether a particular school system is operating within ***384** the parameters of the Constitution. Appreciable weight must be given, however, to the views of those selected by the community to administer the system. *See Dowell,* 498 U.S. at 248, 111S.Ct. 630 (noting specialized knowledge possessed by local school officials).[8] In refusing to consider the Plan, the district court erroneously failed to accord the Board's official position any weight, much less the respect that it was due.

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[8]Though we need not grant CMS the same deference afforded the promulgations and adjudications of a federal administrative agency, the formal declarations of its governing Board "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Ritter v. Cecil County Office of Housing & Community Dev.,* 33 F.3d 323, 328 (4th Cir.1994) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

That the district court so completely disregarded this crucial evidence is telling. Nonetheless, ever mindful of the deference accorded the factfinder, we embark upon the task of examining the court's conclusions.

1. Student assignment

Of all the *Green* factors, the most prominent is the degree of racial imbalance in student assignment. *Freeman,* 503 U.S. at 474, 112 S.Ct. 1430. Uniformity in the racial composition of a given school was the hallmark of official discrimination, "for under the former de jure regimes racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race." *Id.* Court-ordered desegregation was designed to meet the enemy head-on; the long-term stability of attempts at racial balancing in student assignment is often seen as the most conspicuous indication of the courts' success (or lack thereof) in combating the underlying societal evil.

The fundamental questions before us are whether present racial isolation in CMS may be a vestige of the former dual system, and, if so, whether there are practicable measures CMS could take to reduce or eliminate that isolation. In considering these questions, we are bound to focus particularly on the Board's record of compliance with the district court's desegregation orders. *See id.* at 492, 112 S.Ct. 1430 (citing *Dowell*). Because significant and growing racial imbalances in student assignment do exist in CMS, because the Board for decades has failed to comply with certain specific decrees of the district court (particularly regarding the siting of new schools), because these failures may have contributed to current racial isolation, and because future compliance might

practicably reduce this racial isolation, we would vacate the district court's finding that CMS has achieved unitary status with respect to student assignment.

a.

In the wake of the 1970 desegregation order, virtually all of the schools in CMS operated in racial balance for a considerable time. By 1998-99 however, nearly thirty percent of the schools in the system had become racially identifiable.[9] Of the 126 schools included in the CMS desegregation plan, twenty-three are identifiably black and thirteen more are identifiably white. J.A. 11587. Further, virtually all ***385** of the identifiably black schools are located in either the inner city or in the immediate northwest-to- northeast suburbs, the areas of Mecklenburg County with the highest concentrationof African-Americans. In stark contrast, all thirteen of the identifiably white schools are found in the extreme northern and southern areas of the county, both of which (and particularly the latter) have seen dramatic increases in white population during the past thirty years. The trend in CMS toward resegregation of its schools has accelerated markedly since the move to deemphasize satellite zones and mandatory busing in 1992. In the last seven years, the number of CMS African-American students who attend racially identifiable schools (now almost three in ten) has risen fifty percent. J.A.

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[9]Judge McMillan's final desegregation order mandated, *inter alia,* that no school should become "racially identifiable." *Swann,* 311 F.Supp. at 268. Judge Potter interpreted the phrase synonymously with "racially imbalanced," which, as noted within, describes a school with an African-American student population deviating more than fifteen points in either direction from the county-wide norm. *See Capacchione,* 57 F.Supp.2d at 246.

9589.

Indisputably, from 1981 until 1997, the CMS school system went through significant demographic changes. For example, the total population of Mecklenburg County has grown from 354,656 in 1970 to 613,310 in 1997. J.A. 16247. Almost 100,000 children attend CMS, making it the twenty-third largest school system in the country. J.A. 7107. During the period from 1970 to 1997, the black school-age population (ages 5 through 17) in the county has increased by approximately 10,000. J.A. 16247. Over the same period, the corresponding white school-age population has decreased by approximately 3,000, *id.*, and by 1997, African-Americans comprised 34 percent of the county's school-age population, the total of which numbered approximately 108,600. Evidence before the district court revealed that, since 1970, the growing African-American population has migrated outward from the inner city into formerly white suburbs. In turn, many white citizens who formerly populated the city's periphery have moved even farther into the county's outlying reaches. Though parts of the county have become more integrated as the result of these shifts, a disproportionately large number of African-Americans still reside in contiguous clusters generally north and west of the down-town area.

The threshold issue to be addressed is whether the thirty-six racially identifiable schools in CMS represent a vestige of segregation--that is, whether the present racial isolation is causally related to the prior system of de jure segregation. The *Swann* plaintiffs argue, and CMS agrees, that current racial isolation, like the racial isolation of the 1960s and 1970s, results both from past inequities that, to some extent, have persisted to this day, and from the Board's failure to

comply with certain specific directives in the remedial decrees in this case.

Because CMS has not previously been adjudged to have achieved unitary status in student assignment, we are bound under *Swann* to presume that the current racial imbalance in the school population constitutes a continuing vestige of segregation. 402 U.S. at 26, 91 S.Ct. 1267. The *Capacchione* plaintiffs have the burden of showing that the present existence of predominantly one-race schools in CMS "is not the result of present or past discriminatory action." *Id.; see also Riddick*, 784 F.2d at 535.

Our unwillingness to conclude that CMS is unitary with respect to student assignment centers on the Board's failure to comply with court orders regarding selection of sites for the construction of new schools. The role of school siting in achieving sustainable desegregation should not be underestimated. In fact, the importance of site selection has been apparent since the early stages of this case. As the Supreme Court explained in 1971:

> In the past [site selection] choices ... have been used as a potent weapon for ***386** creating or maintaining a state-segregated school system.... [S]chool authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy

> does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races.... In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight.

Swann, 402 U.S. at 21, 91 S.Ct. 1267.

Subsequent to the Supreme Court's decision in *Swann*, Judge McMillan specifically ordered that site selection for new schools could not "be predicated on population trends alone." 379 F.Supp. at 1107. New schools were "to be built where they can readily serve both races." *Id.* In the 1979 *Martin* decision,[10] Judge McMillan devoted an entire section of his opinion to demonstrating that "construction, location and closing of school buildings continue to promote segregation." 475 F.Supp. at 1329. Judge McMillan explained that "[t]he location of schools plays a large if not determinative role in ... insuring that any given assignment and feeder plan will provide meaningful desegregation, rather than just the predictably short lived *appearance* of desegregation." *Id.* at 1332.

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[10]Judge Potter incorrectly declared that "*Martin* was not a unitary status hearing[.]" *Capacchione*, 57 F.Supp.2d at 250. In fact, as the accompanying text indicates, the white parents in *Martin* contended, as the *Capacchione* plaintiffs do today, that CMS had achieved unitary status. Intervening African-American parents, like those herein, maintained to the contrary. In actuality, there is little difference between today's case and *Martin*, and Judge McMillan's findings in the latter are as binding on the parties as any others made in the course of this litigation.

In the years since this decree was issued, CMS has built twenty-five of twenty-seven new schools in predominantly white suburban communities. In the mid 1980s, CMS adopted a formal policy of building "midpoint" schools--schools located midway between black and white population centers. There is little evidence, however, to suggest that CMS faithfully adhered to this policy. Rather, record evidence strongly indicates that the policy influenced the site selection for, at most, four of the twenty-seven new schools. *See* J.A. 15404- 06. Meanwhile, as we discuss *infra,* there is substantial evidence that CMS has allowed many of its older school facilities in the city--schools attended in disproportionate numbers by African-American students--to fall into a state of disrepair.

The Board's record of building the great majority of its new schools on the predominantly white suburban fringe of the county supports two possible conclusions. On one hand, CMS could have been responding to demographic reality--a demand for new classrooms in areas of high population growth (although we note that the number of white students in CMS has decreased since 1970, while the black student population has greatly *increased*). On the other hand, the Board's pattern of school construction could have facilitated or even hastened white flight to the suburbs. As the Supreme Court explained in *Swann,* ***387** "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." 402 U.S. at 20-21, 91 S.Ct. 1267. The Board's school siting policies could well evidence its lack of political will in the face of pressure to abandon desegregative policies--pressure from families who "are concerned about the racial composition of a

prospective school and [who] will make residential decisions accordingly." *Freeman,* 503 U.S. at 513, 112 S.Ct. 1430 (Blackmun, J., concurring).

There is certainly no evidence that CMS has intentionally sought, through its school siting policies, to "lock the school system into the mold of separation of the races" in the way that the Supreme Court described in *Swann,* 402 U.S. at 21, 91 S.Ct. 1267. But the actual choices the Board has made with regard to school siting may in fact be quite similar to the "pattern of school construction and abandonment" described by the Court, with the actual effect that the Court feared of "lock[ing] the school system" into a condition of racial isolation. 402 U.S. at 21, 91 S.Ct. 1267. We cannot conclude, at least in the absence of further fact-finding, that CMS, in choosing sites for new schools, has pursued "meaningful desegregation, rather than just the predictably short lived *appearance* of desegregation." 475 F.Supp. at 1332.

Rather, the Board's practice of siting new schools such that they could not reasonably be expected to serve a racially balanced student population and Judge McMillan's determination that this practice, in the past, represented the school system's failure to eliminate the vestiges of segregation, together raise a strong inference that those vestiges remain today. When this inference is viewed in combination with the burden borne by the *Capacchione* plaintiffs to show that current racial imbalances have *no* causal link to past discrimination, we are compelled to conclude that a remand to the district court is required.

Although we defer to a district court's findings of fact unless clearly erroneous, Judge Potter's error here came in his

application of the legal standard to the evidence regarding the Board's school siting policies. Judge Potter found that (1) CMS had not discriminated on the basis of race in choosing sites for new schools and that (2) CMS had incorporated racial diversity as one of its factors in site selection. Even assuming arguendo that both findings are not clearly erroneous, neither is sufficient to support the legal conclusion that in siting new schools CMS acted in compliance with the governing court orders and Constitution to eliminate the vestiges of segregation to the extent practicable.

"To fulfill this duty, school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system." *Harris v. Crenshaw County Bd. of Educ.*, 968 F.2d 1090, 1095 (11th Cir.1992) (citing *Pitts v. Freeman,* 755 F.2d 1423, 1427 (11th Cir.1985)). Therefore, CMS had to do more than merely select sites for new schools on a nondiscriminatory basis. It had to do more, too, than simply give some consideration to "diversity" in its selection of sites. To the extent practicable, CMS had to site new schools "where they can readily serve both races." 379 F.Supp. at 1107; *see also Swann,* 402 U.S. at 21, 91 S.Ct. 1267; *Martin,* 475 F.Supp. at 1329-32. Judge Potter never found that CMS had met this standard, and as outlined ***388** within, there is substantial record evidence that CMS did not do so.

In accordance with *Swann,* the burden is on the *Capacchione* plaintiffs to prove that vestiges of past discrimination do not remain, or that nothing can practicably be done to remedy them. We note that Judge McMillan, in his last

published decision in this case, clearly evidenced his understanding both that CMS had *not* done all that it could do in the area of school siting and that future school siting decisions could practicably advance the process of desegregation. It was thus incumbent on the *Capacchione* plaintiffs to demonstrate that conditions in Charlotte and Mecklenburg County have changed sufficiently such that school siting no longer represents a practicable opportunity to eliminate the vestiges of segregation.

The *Swann* plaintiffs have identified additional areas in which CMS has fallen short of its obligations under the court orders. For the life of the desegregation orders, CMS has consistently placed the heaviest burden of mandatory busing on African-American students. Currently, 80% of those students who ride the bus as a result of a mandatory assignment are African- American. J.A. 11515. Judge McMillan repeatedly ordered CMS to distribute this burden more fairly. *See* 475 F.Supp. at 1339-40, 379 F.Supp. at 1103-04, 362 F.Supp. at 1232-33. Yet, CMS has utterly failed to do so. In addition, CMS has never developed an effective system for monitoring student transfers to ensure that the overall effect of such transfers is not to increase the racial imbalance in the system as a whole. Again, this represents a failure to comply with the explicit instructions of the district court. *See* 475 F.Supp.at 1337-38, 379 F.Supp. at 1103-04, 362 F.Supp. at 1229- 30. We are troubled by these failings on the part of CMS. They provide additional support for a conclusion that, in the face of political pressure, CMS has not done all that it could do to eliminate the vestiges of segregation.

Finally, the Board has itself taken the remarkable step of *admitting* its noncompliance with prior orders in this case.

A school board's frank acquiescence in a position inuring to its detriment (in this case, the potential of ongoing judicial intervention), if not treated as conclusive, should at least be considered with the utmost gravity. Under these circumstances, we have no difficulty in determining that the district court's conclusion that the Board's level of compliance was "full and satisfactory" should be vacated.

b.

If the vestiges of official discrimination have indeed been eliminated to the extent practicable with respect to student assignment, then there is little reason to prolong court supervision. In light of the district court's failure, however, to recognize the Board's continuing noncompliance with respect to student assignment--administered as recently as twenty years ago in a manner reinforcing the once-official notion that African-Americans are inferior--we have no confidence in the court's ultimate finding that these vestiges have now disappeared.

The district court neglected to determine whether, since Judge McMillan's decision in *Martin,* CMS has fulfilled its constitutional and court-imposed obligations with regard to site selection for new schools. Had the Board's efforts been deemed lacking, the court below should have proceeded to decide whether this failure contributed to the present condition of racial isolation in the school system. If the district court then found that CMS had failed to live up to its constitutional and judicially decreed obligations, and if that failure did contribute to the ***389** present racial imbalances, then the court was bound to further investigate whether proper site selection is a practicable remedy for the lingering effects of the Board's past

discriminatory practices. Only if proper site selection were not a viable option could the district court have relinquished control over student assignment; there would be nothing further that CMS could practicably do to eliminate the vestiges of the prior de jure system.

If, however, proper sites were found to be available, then student assignment should have remained under the district court's control. In fashioning a remedy, the court might have directed, for example, that most or all new schools constructed over the next several years be located proximate to the inner city or in midpoint areas already integrated residentially. Conversely, the district court might have concluded that more flexibility is required because of real estate costs, crushing demand in the suburban fringes, or for some other sufficient reason. In this vein, the Board's Remedial Plan could have been considered as a limited term remedy for the racial isolation that would otherwise continue to exist until the Board's newly redirected school siting policies can begin to take effect.[11]

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[11]The strategies described in the Remedial Plan would be of particular help in deciding whether practicable measures are available. The Plan proposes, among other things, to divide Mecklenburg County into three to five demographically similar "clusters," within which students may choose to attend any school, magnet or otherwise. Where the demand for a given school exceeds the available room, spots would be assigned by lottery based on factors such as proximity, sibling attendance, and racial, ethnic, and economic diversity. The Plan also outlines a formal mechanism to disseminate information regarding the enrollment process, and it provides that the Board will work with the business community and local government to secure subsidies for disadvantaged families wishing to relocate to areas in which low-cost housing is scarce. *See* J.A. 11053-59.

Should corrective action one day be deemed justified in this case, some reasons will not be sufficient to deny African-American students a remedy. For example, political pressure and perceived resistance to change by certain groups in the community will not suffice. Additionally, logistical barriers merely making "difficult" the transport inward of outlying white students will likewise, if reasonably surmountable, not be enough. *Cf. Capacchione*, 57 F.Supp.2d at 253 (district court's observation that "transport[ing] white students in from satellite zones ... is difficult given the rush hour traffic patterns"). Although what is "practicable" need not extend to all that is "possible," rectifying the grievous constitutional wrongs of the past surely justifies reaching beyond the "difficult" or purely "problematic."

2. Physical Facilities

After describing how CMS has allocated its physical facilities and resources among its students, Judge Potter concluded that "the *Swann* plaintiffs have failed to overcome the Court's previous findings on facilities by establishing the requisite discriminatory intent and causation." *Id.* at 267. Judge Potter's mention of "previous findings" refers to excerpts from various opinions and orders authored by Judge McMillan:

> *April 1969*--"No racial discrimination or inequality is found in the .... quality of the school buildings and equipment.... Schools described by witnesses as 'white' ranged well up and down on both sides of [the average per- pupil expenditure], and schools described by witnesses ***390** as 'black' showed a similar variation." 300 F.Supp. at 1366.

> *August 1969*--"The defendants contended and the court found in its April 23, 1969 order that facilities and teachers in the various black schools were not measurably inferior to those in the various white schools. It is too late now to expect the court to proceed upon an opposite assumption." 306 F.Supp. at 1298.
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> *October 1971*--"[T]he formerly black schools are not shown nor suggested to be inferior in faculty, plant, equipment or program." 334 F.Supp. at 625.

Toward the close of the prior proceedings in 1975 (and consistent with the above), Judge McMillan awarded attorney's fees to the *Swann* plaintiffs as prevailing parties, "[e]xcept for the refusal of the court to find in the plaintiffs' favor ... regarding adequacy of physical plants and equipment and teacher quality." *Swann,* 66 F.R.D. at 484.

Judge Potter acknowledged that no court "ha[d] [ ]ever granted unitary status to CMS, nor ... partially withdrawn supervision as to facilities or any other *Green* factor." *Capacchione,* 57 F.Supp.2d at 262. The court nevertheless relied on the above 1969 and 1971 findings to release the *Capacchione* plaintiffs from their burden of proving CMS unitary with respect to facilities, stating that to proceed otherwise would "defy logic." *Id.* at 263. Judge Potter thus accepted the premise that Judge McMillan's 1969 and 1971 findings "constitute collateral estoppel and law of the case" regarding facilities, "thereby shifting the burden to CMS and the *Swann* plaintiffs to show discriminatory intent." *Id.* at 262.

The district court's burden-shifting analysis was an error of law. Once the existence of an unlawful dual school system has been established and court supervision begun, it is presumed that racial disparities arising during the period of intervention "are causally related to prior segregation." *School Bd. of the City of Richmond v. Baliles,* 829 F.2d 1308, 1311 (4th Cir.1987). Following the imposition of judicial control, a party seeking to end the status quo bears the burden of overcoming the presumption of causation. If this burden is met and the school system is declared to have achieved unitary status as to the particular factor at issue, the presumption ends. *Id.* Generally, in any subsequent proceeding involving new allegations of disparate treatment, the complaining party must show purposeful discrimination. *Riddick,* 784 F.2d at 537 (concluding that *Swann* and its progeny require proof of "discriminatory intent on the part of the school board of a unitary school system" in order to resume court supervision).[12]

To be sure, the absence heretofore of any finding to the contrary would have been an important consideration in determining whether the *Capacchione* plaintiffs had proved CMS to have achieved unitary status with respect to facilities. However, that Judge McMillan did not intend his initial observations regarding facilities to be construed as a finding of unitary status is obvious from his subsequent actions. In 1973, Judge McMillan assumed control over facilities and resources, found inequities, and ordered CMS to remedy those disparities. *See Swann,* 362 F.Supp. at 1235 (finding Double Oaks

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[12]However, if a district court retains jurisdiction over one or more *Green* factors, it may, upon a proper showing, reassert control over a factor previously adjudged to have attained unitary status. *Freeman,* 503 U.S. at 508-09, 112 S.Ct. 1430 (Souter, J., concurring).

Elementary access road still undeveloped two years after court's identification of the problem--"No *391 $80,000,000 budget is so powerless."); *id.* (finding Double Oaks library not r stored to standards several years after fire); *id.* at 1238 (ordering athletic facilities at West Charlotte High School immediately upgraded to level comparable with other schools in the county). We must conclude that the Board has been subject to the court's jurisdiction as to its facilities since at least 1973. *See Dowell,* 498 U.S. at 246, 111 S.Ct. 630 (school boards entitled to a "rather precise statement" terminating a desegregation order).

The asserted lack of a prior adverse finding should not have been determinative of the issue, especially as the district court in 1969 was not focusing on a school system suddenly thrust into the judicial arena, but was instead examining one that had been subject to court supervision for nearly four years. Between the commencement of the initial *Swann* lawsuit in 1965 and the district court's first mention of the facilities issue in April 1969, CMS closed sixteen black schools. The Board's *en masse* action gives rise to an almost undeniable inference that these schools were shut down because they were inferior, and the timing also suggests strongly that the closures were prompted by the judicial proceedings then underway.

Viewed in context, the most plausible conclusion is that the putative equality mentioned by the district court in 1969 and 1971 was actually an endorsement of the steps that had been taken by the Board to remedy the inequities in facilities. In any event, CMS could not be said to have achieved unitary status absent a finding by the lower court that the Board had "eliminated the vestiges of its prior discrimination," embodied in an "adjudicat[ion] ... through the proper judicial procedures." *Georgia State Conference of Branches of NAACP v. Georgia,*

775 F.2d 1403, 1413 n. 12 (11th Cir.1985), *quoted in Dowell,* 498 U.S. at 245, 111 S.Ct. 630 (noting distinction between school systems operating in an unitary fashion and those that have achieved unitary status, and observing that the former "could be called unitary and nevertheless still contain vestiges of past discrimination").

Thirty-five years have passed since the Board first acted to equalize its facilities, yet serious questions remain as to whether it has finally realized that goal. Dr. Dwayne E. Gardner, an impressively qualified educational planner and consultant, compiled an exhaustive report for the Board in which he evaluated the suitability of its school facilities.[13] Dr. Gardner examined and personally visited more than half of the schools in CMS (including all of the high schools), analyzing a host of factors affecting educational quality. For the purposes of his study, Dr. Gardner divided the subject schools into three groups: (1) all imbalanced-black schools; (2) all racially balanced schools in imbalanced-black census tracts; and (3) each remaining high school, along with a set of elementary and middle schools randomly selected from the remaining schools and approximately equal in number to those already included within the first two groups.

Each school in the study was assigned a composite score from 0-100, indicating its worthiness. Schools scoring 44 or lower were, in Dr. Gardner's opinion, so deficient as to merit replacement, while those with scores between 45-59 were classified as needing "major improvements." Any school that

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[13]The district court found that the expert called on behalf of the *Capacchione* plaintiffs, Dr. David J. Armor, could offer no reliable testimony on the subject. *See Capacchione,* 57 F.Supp.2d at 264.

scored 60 or above was "considered ***392** to have the ability to serve the educational program adequately." J.A.12174.

The results of Dr. Gardner's study are troubling. The average score for the forty Group 3 schools (racially balanced or imbalanced-white in predominantly white or balanced areas) was 61.7. Although the Group 3 data indicate a situation that is far from ideal, the ten Group 2 schools (racially balanced in predominantly black areas) fared much worse, with an average score of 56.3. The scores of the twenty-three Group 1 schools (imbalanced-black) were worse still, averaging just 53.3.[14] At

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[14]It has been famously said (by either Mark Twain or, earlier, Benjamin Disraeli, depending on one's source), "There are three kinds of lies--lies, damned lies and statistics." A common difficulty in dealing with statistics is illustrated by the district court's analysis of Dr. Gardner's study. The court first noted that, of the four schools scoring in the lowest category, two were in Group 1 and two were in Group 3. *Capacchione*, 57 F.Supp.2d at 264-65. Next, the court observed that the two highest ratings accorded elementary schools were again split between Groups 1 and 3. *Id.* at 265. Based on this selective culling of the data, the lower court concluded that "the results of Dr. Gardner's analysis do not show disparities along racial lines." *Id.* at 264.

The forest that is CMS is not sufficiently mapped by the documentation of a few trees. We could accurately say, for example, that omission from Group 1 of the brand-new elementary school referred to by the district court as having one of the highest ratings would lower the Group 1 average by more than a full point. Or we could state without error that seven of the twenty-three Group 1 schools (more than 30 percent) scored below 50, while only five of the forty Group 3 schools (12.5 percent) scored similarly. Indeed, we note that *none* of the Group 1 high schools scored higher than 46, yet *all* those in Groups 2 and 3 scored at 50 or above. Of course, one would rightly view this latter declaration with some skepticism once it became known that there are but fourteen high schools in CMS, only two of which were included by Dr. Gardner in Group 1.

trial, Dr. Gardner confirmed that the disparities apparent from the above numbers were "substantial" with respect to the facilities generally available to white and African-American children attending CMS. J.A. 6196-99.

The anecdotal accounts of a number of witnesses effectively corroborated Dr. Gardner's conclusions. *See, e.g.*, J.A. 4992 (testimony of Board member Pamela R. Mange) (schools with "more severe" problems tended to be predominantly black); J.A. 4769 (testimony of Annelle Houk) ("[T]he schools that were in the worst repair and had the poorest supply of resources ... were on the west side and they were predominantly populated by black students."). John A. Kramer, co-chair of an advisory task force created by the Board, made formal visits to several CMS schools in 1997. Among the locales on Mr. Kramer's itinerary were Elizabeth Lane Elementary, a predominantly white school located in a prosperous suburban area of the county, and Shamrock Gardens Elementary, a downtown school with an African-American student population exceeding sixty percent. Mr. Kramer's descriptions of his visits contrasted sharply:

> [T]o compare Elizabeth Lane Elementary as an example, which is a relatively new school located in Matthews, I walked into that school, I was overwhelmed because I had never set foot in a school

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The pick-and-choose method gets us nowhere. The value of Dr. Gardner's research lies in the general conclusions that can be drawn from the entirety of the data. The most obvious conclusion is that, as a general matter, imbalanced-black schools in CMS are in worse shape than those attended by larger proportions of white students. Once we accept that premise, the lone remaining question of any significance is "Why?"

> that was like that before. It was clean, it was light and airy, it was a beautiful facility.... My overwhelming feeling was, wow, I wish my kids could ***393** go to this school. And another observation that was very clear was that when I looked at the student body, it was virtually all white students, obviously, affluent, happy kids having a great time.
>
> On the other hand, my experience, for example, at Shamrock Gardens was shocking by comparison. I had never visited either one of these schools before, but to visit that school which is in the inner city, the students are predominantly black students, it reminded me of a rundown 1950s motel. There was literally no access to the rooms except by outer walkways that were covered by rusted, dilapidated overhead fixtures.... They were using closets and things to teach children in. The carpets were stained and threadbare.... It just didn't feel clean, it didn't feel good. And I can honestly say that as a parent, my heartfelt reaction was relief that my children didn't have to go to school there.

J.A. 6098-99. Even those Board members who voted to pursue a determination of unitary status before the district court admitted that disparity in facilities was a problem within CMS. J.A. 1817, 1820 (testimony of James H. Puckett); J.A.1918-19 (testimony of John W. Lassiter); J.A.2095-96 (testimony of Lindalyn Kakadelis).

Although it seems reasonably clear that a racial disparity in facilities exists in CMS, its cause is somewhat less apparent. The *Capacchione* plaintiffs maintain that no discrepancies exist in CMS facilities, and even if they do, such

discrepancies are totally benign in origin. Had the *Capacchione* plaintiffs proved their theory, we would be constrained to affirm the district court's conclusion that unitary status has been achieved with respect to the facilities factor. The district court, however, required the *Capacchione* plaintiffs to prove nothing; it instead erroneously placed the burden on CMS and the *Swann* plaintiffs to affirmatively show that the present inequities in facilities are a vestige of official discrimination, *i.e.*, causally related to the prior de jure system of segregation. *Capacchione*, 57 F.Supp.2d at 267.

The district court erred as a matter of law in foreclosing the development of evidence relevant to a proper vestige analysis. We would therefore remand this portion of the case to permit the parties and the district court to elicit the additional facts necessary to fully consider the question of causation with respect to the current racial inequities in facilities. Because CMS has not been previously adjudged to have attained unitary status, we would charge the *Capacchione* plaintiffs on remand with the burden of demonstrating that the vestiges of past de jure racial discrimination in the context of the school system's facilities have been eliminated "root and branch" to the extent practicable.[15]

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[15]The district court made no findings as to whether practicable remedies exist with respect to facilities. In light of the court's refusal to consider the Board's proposed five-year Remedial Plan, it cannot be determined in the first instance whether practicable remedies to the current disparities exist. We note, however, that the Remedial Plan specifically identifies disparities associated with race in baseline needs for schools' instructional materials and media centers, and the lack of any standardized criteria to evaluate the adequacy of these resources. J.A. 11037-38. The Plan proposes to achieve uniformity in resources across schools by imbalanced allocations that reflect the schools' current resource gaps and

***394** *3. Transportation*

School bus transportation was at the epicenter of the original *Swann* litigation, specifically the degree to which involuntary busing could be used to implement a remedial desegregation decree. The Supreme Court in *Swann*, of course, approved busing as a "normal and accepted tool of educational policy," 402 U.S. at 29, 91 S.Ct. 1267, at least to the extent that the rigors of time and distance would pose little risk to the affected students' health or to the educational process as a whole. *See id.* at 30-31, 91 S.Ct. 1267. In the intervening twenty-nine years, CMS has taken the Court's license to heart; during the 1998-99 school year, five of every six students in the school system rode a school bus.

Upon review of the *Green* factor of transportation, Judge Potter concluded that "a court may grant unitary status when transportation is provided on a non-discriminatory basis." 57 F.Supp.2d at 267. In other words, according to the district court, a school system achieves unitary status with respect to transportation once it provides access to transportation non-discriminatorily to black and white children. Because CMS provides all children, regardless of race, access to transportation, Judge Potter concluded that CMS had achieved unitary status with respect to this *Green* factor.

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imbalances. J.A. 11038-40. Likewise, the Remedial Plan identifies disparities associated with race in the instructional facilities, and proposes building replacements or renovating existing facilities for sixteen schools that are either racially identifiable as black or are located in a predominantly black census tract. J.A. 11041-42. Uniform building maintenance standards and procedures are proposed. J.A. 11043. Monitoring, evaluation, and development of appropriate criteria for evaluation are also proposed to maintain equity across the school system's resources and facilities. J.A. 11038-40, 11042-43.

We must be mindful of the Supreme Court's command to consider the interrelatedness of the various *Green* factors. *See Freeman*, 503 U.S. at 491, 112 S.Ct. 1430 (court must consider "whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system"). In this context, we can only conclude that the *Green* factor of transportation is so inextricably intertwined with the *Green* factors of student assignment and facilities that vacatur on these latter issues would also mandate vacatur on the former.[16]

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[16]Pursuant to *Freeman*, the district court accepted the invitation of the Board and the *Swann* plaintiffs to consider whether vestiges of official discrimination remain concerning the ancillary factors of student achievement and student discipline. The court found in the negative, concluding that CMS had attained unitary status in both areas. We agree that the district court's judgment regarding student discipline should be affirmed.

With respect to the ancillary factor of student achievement, however, we would vacate Judge Potter's holding that unitary status had been achieved. Judge Potter found that disparities in student achievement existed but that the disparities (1) were not vestiges of de jure segregation and (2) could not be remedied by any practicable measure. *Capacchione*, 57 F.Supp.2d at 280-81. An analysis of disparities in student achievement may only be appropriate once the school system has achieved unitary status in other respects. *See Swann*, 306 F.Supp. at 1309 ("Until unlawful segregation is eliminated, it is idle to speculate whether some of this [achievement] gap can be charged to racial differences or to 'socio-economic-cultural' lag."). At the very least, student achievement in this case is inextricably intertwined with the other *Green* factors, particularly student assignment. Therefore, for reasons akin to those discussed in our analysis of the *Green* factor of transportation, we would likewise conclude that the student achievement factor requires further consideration.

The *Swann* plaintiffs maintain and offer substantial record evidence that the burdens of busing for desegregation purposes are being borne disproportionately and unfairly by African-American children. Brief of Appellants at 31-32, 33-35; *see Swann,* 306 F.Supp. at 1298 (district court commenting in initial stages of remediation that it did not intend "to endorse or ***395** approve any future plan which puts the burden of desegregation primarily upon one race"). Eighty percent of students who currently ride the bus as a result of a mandatory assignment are African-American. Judge Potter rejected any consideration of this evidence, holding that a school district has achieved unitary status with respect to transportation as soon as it is provided on a race-neutral basis. The evidence, however, demonstrates the close interrelationship of transportation with student assignment. In view of our conclusion that CMS is not yet unitary with regard to student assignment, we think it is premature to relinquish control over transportation at this stage.[17]

4. Faculty

Our analysis of this factor must take two concerns into account. We must determine both whether CMS has generally eliminated the vestiges of discrimination in faculty assignment,

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[17]While the Remedial Plan does not specifically address transportation as a *Green* factor, it does propose siting new schools in a manner calculated to promote racial balance in CMS. J.A. 11042. If CMS chooses sites for new schools that are more accessible to the majority of the black population, we presume that fewer black students would have to be bused to the suburbs for purposes of desegregation. A new approach to school siting would address the vestiges of past discrimination, if such vestiges remain, in those areas in which CMS has not yet achieved unitary status.

and whether the teachers assigned to predominantly black schools are of comparable quality to those teaching in schools with large numbers of white students.[18] *See Swann*, 311 F.Supp. at 268 (final desegregation order directing that the racial composition of faculty assigned to each school reflect that of the system at large, with the proviso that "the competence and experience of teachers in formerly or recently black schools will not be inferior to those in the formerly or recently white schools in the system").

The evidence at trial demonstrated that CMS assigned its faculty in substantial compliance with the desegregation order at least until 1992, when school principals were granted the leeway to actively recruit new teachers without the strictures of maintaining a specific racial proportion. As a result of this gravitation from centralized to site-based control of faculty assignments, a trend away from proportionality has emerged. In 1998-99, one- third of the 126 schools covered by the remedial decree had a proportion of black faculty deviating more than ten percent from the system-wide norm (about twenty-one percent). Prior to the 1992 change in policy, no more than one- sixth of the schools had ever been so situated.

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[18]The district court considered a particular school to be racially imbalanced if its proportion of African-American students varied more than fifteen percent from the district-wide average. In 1998-99, African-Americans represented 42.7% of the elementary students in CMS, 41.7% of the middle school students, and 39.6% of the high school students. J.A. 11574. An elementary school would therefore be designated imbalanced-black if more than 57.7% of its students are African-American; conversely, if African-Americans constituted less than 27.7% of the student body, the school would be designated imbalanced-white.

We are satisfied that the current trend toward faculty imbalance is neither a vestige of the dual system nor the product of subsequent discrimination. There is no evidence that this trend results from legal or administrative compulsion within CMS or from perceptions about the desirability or undesirability of teaching positions in schools that serve students of predominantly one race. In short, we do not perceive a causal relationship between past de jure segregation and the present assignment ***396** of faculty members to schools within CMS.[19]

Nor do we think that this trend toward more racially imbalanced faculties has resulted in disparities in the quality of teaching, as measured by the instructors'years of experience and post-graduate work. Indeed, there is no significant difference in experience between faculties at imbalanced- black schools as compared to those that are imbalanced-white. Faculties at black schools are about one year less experienced than the district-wide average, while faculties at white schools are correspondingly more seasoned. This disparity may arouse some initial concerns, until one is informed that the typical CMS teacher has spent more than ten years in the classroom.

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[19]Even if the pattern of faculty assignments were somehow shown to be a vestige of past official discrimination, the evidence before the district court casts substantial doubt upon the Board's ability to effect a practicable remedy. *See Capacchione,* 57 F.Supp.2d at 258-59:

> CMS runs the risk of losing significant numbers of teachers if its faculty assignment policies become too restrictive.... Another practical problem faced by the district is the fact that it must constantly hire thousands of new teachers in the midst of a national teacher shortage .... [which] is especially pronounced with regard to black teachers, particularly in this region of the country.

The upshot is that black and white students alike are, with no meaningful distinction, enjoying the benefits of their teachers' substantial experience.

The difference in post-graduate education between black-school and white- school faculties is more pronounced. For every three teachers holding advanced degrees who ply their craft at imbalanced-white schools, there are only two similarly qualified teachers assigned to schools that are imbalanced-black. Compared to the district average, white schools have a somewhat larger proportion of these highly trained instructors, while the allotment granted to black schools is slightly less than the norm.

Although these facts give us reason for concern, we think it imprudent to disturb the district court's conclusion that the trial evidence affirmatively disclosed no link between past discrimination and the current asymmetry. Most revealing on this point is that, until now, the issue of teacher quality within CMS has not been contested. The 1970 desegregation order mandating equal competence and experience in faculty assignments was not meant to remedy disparities then existing, but was instead intended to caution against future imbalances. In the intervening thirty years, there is little indication that CMS has neglected to heed the warning inherent in that order. We therefore agree that the district court did not clearly err in concluding that the developing disparities in teacher assignments and any (perhaps superficial) deficiency in the quality of instruction currently afforded African-American children are unrelated to the de jure segregation once prevalent

in the school system.[20]

5. Staff

In substantially the same manner as it spoke to the allocation of teachers, the final desegregation order provided that "the internal operation of each school, and the assignment and management of school employees, of course be conducted on a non-racial, non-discriminatory basis." ***397** *Swann,* 311 F.Supp. at 269. Inasmuch as the *Swann* plaintiffs raised no challenge to the school system's compliance with the desegregation order in this regard, the court below found CMS to have achieved unitary status with regard to its support staff. We agree that this aspect of the district court's judgment should be affirmed.

6. Extracurricular activities

According to the evidence at trial, African-American students in CMS participate in athletics and hold class office at a rate proportionate to their numbers. These same students lag far behind, however, when it comes to participating in co-curricular clubs and honors programs. J.A. 11634. However, the scope of our inquiry concerning extracurricular activities is limited. We need only determine whether the school system permits its students equal access to extracurricular activities, without regard to race. *Coalition to Save Our Children v. State Bd. of Educ. of Delaware,* 90 F.3d

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[20]Although the Board's official position, as outlined in its Remedial Plan, is that remediable vestiges of de jure segregation do remain as to faculty assignments and quality, the clear weight of the evidence is to the contrary. The district court's failure to consider the Plan was therefore harmless in this narrow respect.

752, 768-69 (3d Cir.1996) (citation omitted); *see also Swann*, 402 U.S. at 18-19, 91 S.Ct. 1267 ("[T]he first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary.... In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs.").

The criterion of equal access is surely satisfied in this regard. Participation in honors programs and co-curricular clubs is strictly voluntary, and there is no evidence that the lack of participation by African-American students in certain activities reflects the efforts of CMS to exclude them. We discern no error in the district court's conclusions regarding this *Green* factor.

C.

Pursuant to the foregoing, we agree that the district court should be affirmed in its determination of unitary status with respect to faculty, staff, extracurricular activities, and student discipline. However, we believe that the court's judgment should be vacated and the case remanded for further consideration in the areas of student assignment, facilities, transportation, and student achievement.

III.

We now turn to the question of whether the Board's adoption of the expanded magnet schools program with its race-conscious assignment policy violates the Constitution. We

conclude that it does not.[21] *See also* Wilkinson Op. at 353-355.

At the outset, we note that it is undisputed that this expanded magnet schools program differs in critical respects from *all* race-based student assignment plans that have been held to be in conflict with the Equal Protection Clause. Unlike school districts found to have violated the Constitution, CMS adopted the challenged program while operating a dual, segregated school system, under a myriad of court orders commanding the Board to eliminate the unlawful segregation.

The court orders--the public record attests to their numerosity and demands-- require CMS to use its expertise and best efforts to desegregate its schools promptly. The federal court repeatedly directed ***398** the school board to employ its "full 'know-how' and resources" to use "any means at [its] disposal" to do away with the unconstitutionally segregated school system. *Swann,* 311 F.Supp. at 269; *accord Swann,* 318 F.Supp. at 802 (characterizing this directive as the "most important single element" of its order); *see also Swann,* 402 U.S. at 15, 91 S.Ct. 1267 ("[S]chool authorities are 'clearly charged with the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch.'") (quoting *Green,* 391 U.S. at 437-38, 88 S.Ct. 1689) (emphasis added); *Swann,* 379 F.Supp. at 1105 (giving CMS the authority to resolve "the sizeable continuing problems yet remaining ... by

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[21]We review the district court's factual findings for clear error and its legal conclusions de novo. *See Freeman,* 503 U.S. at 474, 112 S.Ct. 1430; *United States v. Texas,* 158 F.3d 299, 306 n. 8 (5th Cir.1998); *Little Rock Sch. Dist. v. North Little Rock Sch. Dist.,* 109 F.3d 514, 516 (8th Cir.1997).

spontaneous action by staff or board"); *Swann,* 306 F.Supp. at 1297 (leaving "[t]he choice of how to do the job of desegregation" to CMS, and noting it "has *wide discretion* in choosing methods") (emphasis added); *Swann,* 300 F.Supp. at 1360 (providing CMS with authority "to consider *all known ways of desegregation* ") (emphasis added). *Accord Freeman,* 503 U.S. at 485, 112 S.Ct. 1430 ("The duty and responsibility of a school district once segregated by law is to take *all steps necessary* to eliminate the vestiges of the unconstitutional *de jure* system.") (first emphasis added).

Nor is there any doubt that at the time CMS adopted the expanded magnet schools plan, it was not a unitary school system. This is because even if Judge Potter did not err in decreeing that CMS has *now* achieved unitary status (and we believe he did), prior to his decision, no court had ever determined that CMS had attained unitary status. As the *Capacchione* plaintiffs concede, Judge Potter's decision--not some earlier event--"terminated[the] injunction" issued by Judge McMillan and affirmed by the Supreme Court. Brief of Appellees at 3.

Judge Potter properly acknowledged both the governing court orders and the fact that the remedial measures CMS took pursuant to them, including expansion of its magnet schools program, could not be analyzed as if taken by a "de facto" unitary school district. *See Capacchione,* 57 F.Supp.2d at 285 ("The Court finds no legal basis for a finding of *de facto* unitary status that would abrogate CMS's immunity retroactively. In other words, the termination of court supervision cannot 'relate back' to an earlier time."). Yet, notwithstanding CMS's undisputed status as a dual school district under multiple court orders to desegregate its schools, the judge held that the Board's

adoption of the expanded magnet schools program violated the Equal Protection Clause. Furthermore, he found this constitutional violation rendered CMS liable to the *Capacchione* plaintiffs for damages and enormous attorney's fees.

The *Capacchione* plaintiffs seek to uphold that ruling on several grounds. First and principally, they contend that the Board's increased reliance on magnet schools constituted a "voluntary desegregation plan implemented to counteract demographic change," rather than a good faith effort to eliminate the vestiges of discrimination as required by the court orders governing this case. Second, they argue that the expanded program's race-conscious assignment policy violated the existing desegregation orders. Finally, they maintain that, even if CMS expanded its magnet schools program pursuant to and in compliance with governing court orders, strict scrutiny nonetheless applies and requires that the program be held unconstitutional. The district court properly rejected the first and third arguments, and the dissent does not seek to resurrect them. Accordingly, although we address all of these contentions, we initially ***399** examine the second, the only one on which the district court, or the dissent, relies.

A.

In concluding that the expanded magnet schools program violated the Constitution, the district court committed two fatal errors. Initially, it ignored the extent of the protection afforded an entity governed by federal court orders. Then, the district court refused to recognize the broad directives and expansive terms of the controlling court orders, and so failed to appreciate that the Board expanded its magnet schools program

in good faith to comply with these orders, and thus cannot be held to have violated the Constitution. The dissent replicates both errors.

1.

Judge Potter, like the dissent, does pay lip service to the "immunity" the Board enjoyed because it was subject to numerous judicial desegregation decrees, *see, e.g., Capacchione,* 57 F.Supp.2d at 285 ("CMS enjoys immunity from liability for any actions it took consistent with the Court's injunction."); Traxler Op. at 46. But the district court and the dissent apparently do not understand what the numerous court orders in this case required of CMS and the breadth of the protection those orders afforded to it. Thus, both Judge Potter and the dissent mention the subject only in passing, failing even to cite controlling Supreme Court cases on point. *See id.*

A person or entity subject to a judicial decree or injunction (as CMS indisputably was when operating its dual, segregated school system) must comply with that decree or injunction, notwithstanding its possible unlawfulness. Thus, the Supreme Court has clearly and unequivocally directed that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, *even if they have proper grounds to object to the order.*" *GTE Sylvania, Inc. v. Consumers Union of the United States,* 445 U.S. 375, 386, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980) (emphasis added); *see also W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983).

The only possible exceptions to this "important public policy," *W.R. Grace,* 461 U.S. at 766, 103 S.Ct. 2177, arise if a court lacks jurisdiction over the subject matter of the order or the order has " 'only a frivolous pretense to validity.' " *GTE,* 445 U.S. at 386, 100 S.Ct. 1194 (quoting *Walker v. City of Birmingham,* 388 U.S. 307, 315, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967)). Without question, the federal court had jurisdiction over the subject matter of the desegregation orders issued in this case and no one suggests that those orders constituted "only a frivolous pretense to validity."

Accordingly, CMS had to obey those orders. This is so notwithstanding that those orders may have required the Board to forego competing obligations, *see W.R. Grace,* 461 U.S. at 767-68, 103 S.Ct. 2177, including obligations seemingly required by a federal statute, *see GTE,* 445 U.S. at 378 & n. 2, 386-87, 100 S.Ct. 1194, or the Constitution itself, *see Walker,* 388 U.S. at 317, 87 S.Ct. 1824. Indeed, the Supreme Court has explained that to hold that an entity acts "improperly" in obeying a valid court order "would do violence to the common understanding of the term 'improperly,' " even if the order is later held unlawful or unconstitutional. *GTE,* 445 U.S. at 387, 100 S.Ct. 1194. Moreover, a court order need not mandate specific or precise procedures to compel obedience. Thus, although the Court noted the "breadth and vagueness" of the injunction challenged in *400 *Walker,* it nonetheless held that the injunction had to be obeyed until "modified or dissolved." *Walker,* 388 U.S. at 317, 87 S.Ct. 1824.

"Violations of [a court] order are punishable as criminal contempt even though the order is set aside on appeal." *United States v. United Mine Workers,* 330 U.S. 258, 294, 67 S.Ct. 677, 91 L.Ed. 884 (1947). *Accord Spangler,* 427 U.S. at 438,

96 S.Ct. 2697 ("Violation of an injunctive decree ... can result in punishment for contempt in the form of either a fine or imprisonment."). Conversely, when a person or entity acts in good faith to comply with a court order, it should not be punished. Thus, in words that resound here, the Supreme Court has explained that "a school board and a school constituency which attempt to comply with a[court-ordered desegregation] plan to the best of their ability should not be penalized." *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 421, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977).

Indeed, the Supreme Court has twice expressly held that school boards under court orders to desegregate must comply with those desegregation decrees until absolved of that obligation by a subsequent court order, even if the existing desegregation decrees are improper or unnecessary. In *Spangler,* the Court concluded that the district court exceeded its remedial discretion when it ordered the Pasadena school district to reconfigure its student attendance zones annually so that there would be "no majority of any minority" in any school. 427 U.S. at 434-35, 96 S.Ct. 2697. Despite the impropriety of this order, the Court held that the school board had to obey the order until it was properly modified or reversed by a court. *See id.* at 439-40, 96 S.Ct. 2697 ("[T]hose who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to the order, until it is modified or reversed.").

Similarly, in *Dowell,* the Court refused to interpret an arguably ambiguous court order as having terminated the desegregation decree previously entered against the Oklahoma City school board. Instead, the Court remanded the case to the district court for a determination of "whether the Board made

a sufficient showing of constitutional compliance ... to allow the injunction to be dissolved." *Dowell,* 498 U.S. at 249, 111 S.Ct. 630. In doing so, the Court explained that judicial orders carry binding authority until they are modified or dissolved.

Moreover, the *Dowell* Court rejected precisely the kind of argument the *Capacchione* plaintiffs seek to make here. In *Dowell,* as here, those challenging the school board's actions argued (and the court of appeals found) that the school board "unilaterally and contrary to specific provisions" of the controlling court orders "acted in a manner not contemplated by the court in its earlier decrees." *Dowell by Dowell v. Bd. of Educ. of Okla.,* 795 F.2d 1516, 1521 (10th Cir.1986). The Supreme Court acknowledged that this might well be so, but concluded that nonetheless it did "not think that the Board should be penalized for relying on the express language of that order." *Dowell,* 498 U.S. at 249 n. 1, 111 S.Ct. 630. Similarly, even if CMS had "acted in a manner not contemplated" in the governing orders--and clearly it did not, *see infra,* at part III.A.2--it should not "be penalized for relying on the express language" of those orders, *Dowell,* 498 U.S. at 249 n. 1, 111 S.Ct. 630, i.e., "to use [its] full 'know-how' and resources ... to achieve the constitutional end [i.e., desegregation of the schools] by any means at [its] disposal." *Swann,* 318 F.Supp. at 802.

***401** Of course, the *Capacchione* plaintiffs could have sought to modify or dissolve the *Swann* orders as inconsistent with their rights under the Constitution; what they could not do is obtain an injunction, or declaration, that a party compelled to adhere to those orders violated the Constitution in so doing. CMS was obliged to follow the governing desegregation orders and injunctions, and thus the Board "should not be penalized,"

Brinkman, 433 U.S. at 421, 97 S.Ct. 2766, for its actions, which were taken to comply with those orders and which the district court found, and the dissent does not dispute, were taken in good faith. *See* Traxler Op. at 41.

With these principles in mind, we turn to the desegregation orders in this case and the Board's actions in response to those orders.

2.

Throughout the course of the desegregation efforts in this case, the federal courts--from the district level to the Supreme Court--have told the Board that it has the authority to take "whatever steps might be necessary to convert to a unitary system." *Swann,* 402 U.S. at 15, 91 S.Ct. 1267; *see also Swann,* 300 F.Supp. at 1360 ("The Board is free to consider *all known ways of desegregation.*") (emphasis added). Thus, CMS has continually acted under judicial directives that "[t]he choice of how to do the job of desegregation is for the School Board--not for the court." *Swann,* 306 F.Supp. at 1297. *See also* Wilkinson Op. at 353-355.

Even beyond CMS's broad discretion to choose its own methods of eliminating its unconstitutionally segregated schools, Judge McMillan's orders repeatedly endorsed the Board's general power and duty to maintain control over the racial composition of the schools in order to eliminate the vestiges of the segregated system "root and branch." For instance, in 1970 Judge McMillan mandated:

> That the defendants maintain a continuing control over the race of children in each school ... and *maintain the*

> *racial make-up of each school* (including any new and any reopened schools) to prevent any school from becoming racially identifiable.... The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition.... The *defendants are encouraged to use their full 'know-how' and resources to attain the results above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the results.* 311 F.Supp. at 268-69 (emphasis added and emphasis omitted); *see also* 362 F.Supp. at 1225 (same); 334 F.Supp. at 631 (same); 475 F.Supp. at 1342 (approving counsel's statement that "if this Board of Education chose to run an integrated school system on the basis of *preconceived ratios,* it has that constitutional right") (emphasis added); 318 F.Supp. at 801 (ordering "[t]hat 'freedom of choice' or 'freedom of transfer' may not be allowed by the Board if the cumulative effect of any given transfer or group of transfers is to increase substantially the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired").

Moreover, Chief Justice Burger's opinion for the Supreme Court in *Swann* provides explicit sanction of the Board's use of racial "ratios" or proportions in assigning students to schools:

> *School authorities* are traditionally charged with broad power to formulate and implement education policy and *might well conclude,* for example, that in order to prepare students to live in a ***402** pluralistic society

> *each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.* To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. 402 U.S. at 16, 91 S.Ct. 1267 (emphasis added).[22]

Not only was CMS empowered to use ratios in student assignments generally, it was also specifically authorized to use race-conscious assignment policies for "appropriately integrated optional schools." *Swann*, 379 F.Supp. at 1103. Judge McMillan approved the Board's policy, which provided:

> *Strict and central control must be exercised over all admissions (reassignments) to each optional school* in order to fulfill the necessary ends that these schools be open to all county residents and *be integrated by grade at or above approximately a 20% black ratio.* Reassignments to optional schools must not jeopardize the racial composition of any other school.

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[22]The dissent's suggestion that this holding in *Swann* was somehow abrogated by *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) is baffling. Neither case overruled, explicitly or implicitly, the *Swann* Court's authorization for *this school board* to assign students according to a "prescribed ratio." *Swann*, 402 U.S. at 16, 91 S.Ct. 1267. This is not an instance in which CMS is attempting to extend an analogous Supreme Court holding to fit its own needs. Rather, the Supreme Court authorized *CMS's* actions specifically, and that authorization has never been overruled. As such, CMS is entitled to follow it. *See infra*, at part III.C.

> Guidelines and central monitoring by the Pupil Assignment staff with the respective school principals are to be drawn up. Capacities and allocation of maximum numbers of students that may be drawn from each other school attendance area, by race, are to be designated. The *actual enrollment of the optional school may have to be guided by its racial composition* and by the number drawn from each other school area, not by considerations of space and program only.

Id. at 1108 (emphasis added).

In response to these directives, in the 1970s CMS established some magnet schools, which it called "optional schools." These schools offered two special curricula--"open" and "traditional"--both of which constituted "very rigorous academic program[s]" not offered in "conventional schools." J.A. 2489, 15683. In 1992, the Board expanded its magnet schools program into a district-wide system with a wider range of curricular choices. In the expanded magnet schools program, the Board retained the curricula first available in the early magnet or "optional" schools--the "open" curriculum emphasizing "interdisciplinary approaches," and the "traditional" curriculum featuring a "highly structured program." J.A. 16722-23. Furthermore, six of the early magnet schools that offered such curricula prior to 1992--Myers Park, Elizabeth, Hawthorne, Irwin Avenue, Piedmont, and West Charlotte--continue to do so today under the expanded magnet schools program. *Compare* J.A. 13448, 13529-40, 15683 (pre-1992 "open" and "traditional" magnets) *with* J.A. 16722-23 (1998-99 "open" and "traditional" magnets); *see also* J.A. 10061 (report indicating that pre-1992

magnet schools were incorporated into the 1992 expanded magnet schools program).[23]

***403** The expanded magnet schools program is a typical and appropriate desegregation tool "conceived and developed in large, urban school districts seeking a voluntary alternative to busing as a means of decreasing racial segregation." J.A. 10654. Even the dissenters recognize that "a magnet schools

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[23] Judge Potter recognized that the optional schools "were similar to today's magnet schools," both having "countywide enrollment and a racial balancing target." *Capacchione,* 57 F.Supp.2d. at 286. He nonetheless concluded that the schools established after 1992 under the expanded magnet schools program "differ from optional schools in that [the new] magnets offer specialized curricula and thereby confer a benefit above and beyond the regular academic program." *Id.* at 286-87 n. 49. The dissent allies itself with this view, Traxler Op. at 49, but nothing in the record offers any support for it. To the contrary, assuming arguendo that "specialized curricula" constitute a "benefit," the magnet schools instituted after 1992 provide precisely the same "benefit" as the pre 1992 "optional schools." *See* J.A. 10552 (proposed 1992 pupil assignment plan recommending *continuation* of six magnet schools already in place); J.A. 15504 (1993 letter noting that magnet schools were called "optional schools" prior to 1992); J.A. 10651 (Summary of Findings From Research on Magnet Schools explaining that "[o]ur optional schools function as magnet schools"); J.A. 13606, 15581 (Stolee Plan explaining that "[t]he traditional schools presently existing in Charlotte-Mecklenburg are good examples" of curriculum specialty schools, "sometimes called magnet schools"). After all, it was only because the optional schools did offer certain "specialized curricula" that parents (including Michael Grant, one of the *Capacchione* plaintiffs, J.A. 2489) were willing, well prior to the 1992 expanded magnet schools program, to enroll their children in desegregated optional schools. *See* J.A. 13641, 15616. In fact, the original six "open" and "traditional" schools remain among CMS's more heavily subscribed magnets. *See* J.A. 10292-340. Myers Park Traditional, for example, had 245 students on its waiting list for the 1998-99 school year. *See* J.A. 2159.

program, properly implemented, can no doubt be an effective desegregation tool." Traxler Op. at 50. But they nonetheless suggest that the expanded magnet schools program, in and of itself, may violate the Constitution. *See id.* at 352-354. This suggestion is surprising, given that the federal courts have consistently approved magnet school plans as desegregation tools. *See, e.g., Milliken v. Bradley,* 433 U.S. 267, 272, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (*Milliken II*); *Stell v. Savannah- Chatham County Bd. of Educ.,* 888 F.2d 82, 85-86 (11th Cir.1989); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1,* 839 F.2d 1296, 1309-12 (8th Cir.1988); *United States v. Yonkers Bd. of Educ.,* 837 F.2d 1181, 1237-39 (2d Cir.1987); *Liddell v. Missouri,* 731 F.2d 1294, 1310-11 (8th Cir.1984). The dissent's suggestion that CMS somehow violated the Constitution by expanding its magnet schools program and "abandon[ing] pairings, satellites, and feeders," Traxler Op. at 50, seems particularly extraordinary. Magnet schools are generally regarded as being a less onerous and more successful desegregation tool than pairing, satellites, or feeders because magnet schools provide more opportunity for student choice. *See, e.g., Stell,* 888 F.2d at 85; *Yonkers,* 837 F.2d at 1239.

Of course, as Judge McMillan warned, in approving the early magnet or optional schools, assignment of pupils to such schools must be undertaken in a manner that "provide[s] ... access to appropriately integrated optional schools," and "prevent[s] significant jeopardy to the racial composition of other schools." *Swann,* 379 F.Supp. at 1103.[24] For this reason,

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[24]The dissent's contention that Judge McMillan "cautio[ned]" CMS against creating optional schools because the schools were marked by "failure" flies in the face of the court orders. Traxler Op. at 49. In fact, the

race is, *404 and must be, considered in assigning students to the magnet schools instituted under CMS's expanded program, just as it was in assigning students to the original magnet or optional schools. *See* 379 F.Supp. at 1108. Specifically, under the expanded program, CMS allocates 40% of the seats in its magnet schools for black students and 60% for students of other races. This ratio reflects the student population of the school system, which is approximately 41.0% black, 52.2% white, 3.7% Asian, 2.5% Hispanic, and 0.5% American Indian. CMS generally assigns students to its magnet schools using two parallel lotteries, one for black students and one for white students. When there has been insufficient interest from black students to fill the seats allocated to them in a particular school, CMS has sometimes refused to allow students of other races to fill those slots. Thus, race may affect a student's chances of being assigned to a magnet school.

It is this portion of the expanded magnet schools program that Judge Potter regarded as unconstitutional,

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only warnings that Judge McMillan gave regarding optional schools were against repeating the past "failure" to provide adequate transportation and against failing to provide "adequate safeguards against discriminatory results," so as to prevent optional schools from "resurrect [ing]" "freedom of choice" plans under a new name. *Swann,* 379 F.Supp. at 1103-04.

Moreover, the dissent's heavy emphasis on Dr. Stolee's recommendation to the Board that it seek court approval of the expanded magnet schools program is puzzling. That one advisor should suggest this does not change the facts, and the critical facts here are that the expanded magnet schools program was simply an expansion of the court-appointed optional schools. Even if this were not so, the Board's decision to ignore a recommendation from one educational adviser (not a lawyer) on a legal matter certainly does not evidence the Board's bad faith or render its action violative of any court order.

reasoning that Judge McMillan "firmly rejected the use of rigid racial quotas." *Capacchione,* 57 F.Supp.2d at 286 (relying on *Swann,* 306 F.Supp. at 1312). In reaching this conclusion, Judge Potter misread the order on which he assertedly relied and ignored the multiple other orders and injunctions governing this case.

Actually, in the very paragraph on which Judge Potter relied, in which Judge McMillan held that "[f]ixed ratios of pupils in particular schools will not be set" *by the court,* Judge McMillan also held that "efforts *should be made* [by the school board] to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others." *Swann,* 306 F.Supp. at 1312 (emphasis added). Judge Potter transmuted this statement--an *authorization* for the Board to make "efforts" to "reach a 71-29 ratio"--into a *prohibition* against the Board assigning students to schools on the basis of that fixed ratio. *See Capacchione,* 57 F.Supp.2d at 286. We cannot accept this reading of Judge McMillan's order. Taken as a whole, this paragraph provides some of the clearest evidence that Judge McMillan not only authorized the Board to use fixed ratios in assigning students to schools but encouraged it to do so. Recognizing the impracticability of adopting a court-ordered, system-wide racial balance to which all schools must adhere, Judge McMillan did observe that "variations from that [71-29 ratio] may be unavoidable." *Swann,* 306 F.Supp. at 1312. But that statement imposes no limitations on the scope of permissible Board action. Rather, it suggests that "variations" were acceptable only because they were "unavoidable."

The Board could not have accomplished what the desegregation orders required without "using race" in the way

that it "used race" in the context of the expanded magnet schools program. In the 1970 order, affirmed by the Supreme Court, *405 Judge McMillan decreed "[t]hat pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." *Swann*, 311 F.Supp. at 268. We cannot fathom how the Board could set out to achieve "about the same proportion of black and white students" in each grade level in each of its over one hundred schools without employing fixed racial ratios as the central components of its student assignment plan. Neither, apparently, could Judge McMillan.

To achieve "about the same proportion," the Board necessarily had to set fixed upper and lower limits on the proportion of white and black students it would permit in each grade in each school. Only with these fixed racial proportions as its lodestars could the Board assign students to schools, and approve or deny individual requests to transfer. The Board could never have justified a denial of a transfer request without having a fixed conception of exactly how few white or black students in a particular school would be too few.

Indeed, Judge McMillan expressly approved many aspects of the CMS desegregation plan that were explicitly based on strict racial ratios. For example, the Board's majority-to-minority transfer policy, which was specifically authorized by the governing desegregation orders, takes race into account in much the same way as the magnet schools assignment policy. Under the transfer policy, a student in the racial majority in his current school could freely transfer to a school in which he would be in the racial minority. A white student in a majority white school, for example, could freely

transfer to a majority black school, but that same student could be denied admission to a majority white school, solely on the basis of a rigid 50% racial ceiling. Meanwhile, a black student at a majority black school could freely transfer into the same majority white school to which the white student might be denied admission. The Supreme Court approved this use of majority-to-minority transfer policies as "a useful part of every desegregation plan" and "an indispensable remedy." *Swann*, 402 U.S. at 26, 91 S.Ct. 1267. In fact, Judge McMillan specifically upheld this majority-to-minority plan, despite former CMS Superintendent Dr. J.M. Robinson's complaints about the rigidity of the 50% limit. *See Martin*, 475 F.Supp. at 1343 ("I would like to have had more flexibility than the 50 percent in some instances, but I would be opposed to recommending any plan that went, any of the schools going over more than a few percentage points above 50 percent.").

It is certainly true that Judge McMillan's orders and the Supreme Court's opinion in *Swann* consistently signaled concern with the imposition of racial proportions or ratios *by federal courts*. That concern, however, is rooted in the problem of federal courts exceeding their remedial discretion, not in any objection to the use of racial proportions or ratios by school boards themselves in their desegregation plans. Thus, the Supreme Court noted that, "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole," but went on to conclude that "the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." *Swann*, 402 U.S. at 24-25, 91 S.Ct. 1267.

That this concern with ratios is rooted in the limits of judicial power to order remedial action, not in the impropriety of using racial proportions to remedy the vestiges of segregation, is nowhere more apparent than in Chief Justice Burger's statement ***406** in *Swann.* There, the Chief Justice noted that while in certain circumstances it might be inappropriate for a federal court to require adherence to "a prescribed ratio of Negro to white students reflecting" the population of the "district as a whole," it would be "within the broad discretionary powers of school authorities" to do so. *Id.* at 16, 91 S.Ct. 1267. *See also* Wilkinson Op. at 354.

Indeed, in *Swann* 's companion case, *North Carolina State Bd. of Educ. v. Swann,* 402 U.S. 43, 45-46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), the Supreme Court held that any attempt to "inhibit or obstruct" the Board's use of racial ratios "must fall." The Court explained that, "when past and continuing constitutional violations are found [as they had been in the Charlotte- Mecklenburg school system], some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device ... contravenes the implicit command of *Green.*" *Id.* at 46, 91 S.Ct. 1284. The Court expressly recognized that a "*flat prohibition* against assignment of students for the purpose of creating racial balance *must inevitably conflict with the duty of school authorities* to disestablish dual school systems." *Id.* (emphasis added).

The Board's authority to employ racial ratios is explicit not only in the Supreme Court's opinions, but also in Judge McMillan's repeated statements to the effect that "[i]ndependent of any court order ... if this Board of Education chose to run an integrated school system *on the basis of*

preconceived ratios, it has that constitutional right." *Martin,* 475 F.Supp. at 1342 (internal quotation marks omitted). In fact, early in the litigation Judge McMillan held that:

> Counsel for the plaintiffs says that since the ratio of white to black students is about 70/30, the School Board should assign the children on a basis 70% white and 30% black, and bus them to all the schools. This court does not feel that it has the power to make such a specific order. Nevertheless, the Board does have the power *to establish a formula* and provide transportation.

Swann, 300 F.Supp. at 1371 (emphasis added).

Moreover, this Court upheld "the validity of the Board's decision to reassign students in order *to maintain racial ratios,*" and stated that the "School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority [over 50%] of minority students." *Martin,* 626 F.2d at 1167. Having been repeatedly told by federal courts that it had the "constitutional right" to "maintain racial ratios" to remedy past segregation, CMS cannot now be held to have violated the Constitution for doing exactly what the courts have said it had the power to do.

In short, time and again, the federal courts at all levels have authorized the Board to employ racial ratios to remedy its unlawfully segregated school system. Although the dissent repeatedly contends to the contrary, Traxler Op. at 52, 54, 55, no court has ever prohibited CMS (rather than the federal court supervising it) from imposing "racial ratios." The dissent's

contention that Judge McMillan's order--mandating a black student population "about or above 20%" in the optional schools, instead of the Board's proposed "at or above approximately 20%" language--constitutes a rejection of "rigid racial quotas," Traxler Op. at 53, is singularly unconvincing. It seems unlikely that by this slight word difference Judge McMillan even indicated a disapproval of the *Board's* use of "rigid" quotas, which would otherwise ***407** have been permitted under the Board's policy. It seems far more likely that Judge McMillan believed that his order permitting a racial ratio "about or above 20%" was equivalent to the Board's policy of permitting a racial ratio "at or above approximately 20%." In any event, neither linguistic formulation *prohibits the Board* from adopting an 80-20 ratio for the early optional schools, or the 60-40 ratio for magnet schools that it subsequently adopted in 1992, especially in light of the Board's broad discretion and explicit authorization to use strict racial ratios in other areas of its desegregation plan.

Similarly, the dissent's suggestion that the expanded magnet schools program differs from the "optional schools" program because the Board set "inflexible quotas" in the expanded plan, Traxler Op. at 44, is simply not borne out by the record. In truth, in 1992, CMS implemented a 60-40 white-black ratio with an eye to reaching a racial balance that corresponded with the make-up of the entire student population of the school system, just as in 1974 it implemented the 80-20 white-black ratio to correspond with the entire student population at that time. The 60-40 ratio was not applied in any more of a rigid or "inflexible" manner than the earlier ratio; Board policy provided that "all magnet schools would maintain a 60-40 white-black ratio *plus or minus 15%*," J.A. 13705; *see also* J.A. 3187, 3193, and the Student Assignment Plan

permitted "racial balance [to] be allowed to fluctuate." J.A. 15702. The Board's Executive Director of Planning and Student Placement testified that several race-neutral considerations, such as sibling attendance, would allow a school to "depart from the 60-40 goal." J.A. 3217; *see also* J.A. 3091-92, 3193-94. Contrary to the dissent's claims of rigidity, not a single magnet school actually manifested a 60-40 ratio. J.A. 3185. A number of magnet schools came close to the stated goal, but the percentage of black students in CMS's magnet schools ranged from 7% to 82%, *id.*, and students that failed to gain admission to one magnet school "often ha[d] a seat waiting for them at another magnet school of their choosing." J.A. 3076. In fact, the two "black seats" about which Christina Capacchione originally complained were ultimately filled by two white students, despite the supposedly "inflexible" ratio. In sum, the 60-40 ratio was not an unbendable "quota," either in policy or in practice, any more than the earlier ratio had been.

Both the Supreme Court and Judge McMillan provided CMS with "wide discretion" to fashion appropriate remedies in light of the particular needs of its pupilsand the school system's experience with other desegregation tools. Additionally, Judge McMillan approved specific race-conscious assignment measures generally and specifically as to magnet schools.[25]

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[25]The dissent, *see* Traxler Op. at 50, makes much of Judge McMillan's 1970 instruction that "leave of the court be obtained before making any material departure from any specific requirement set out herein," *Swann*, 311 F.Supp. at 270. But the dissent fails to acknowledge that this statement followed Judge McMillan's declaration that the Board had "maximum discretion ... to choose methods that will accomplish the required result." *Id.* The "material departure" provision was not an attempt to limit the Board's ability to choose its own methods to move aggressively

Thus, when adopting a 60-40 assignment formula in the expanded magnet schools ***408** program, the Board not only acted within its "wide discretion," but also in accordance with specific procedures approved by the district court.

Judge Potter's conclusion (and the dissent's contention) to the contrary simply cannot be reconciled with the Supreme Court opinion in *Swann*, our opinions in this case, and Judge McMillan's decrees. The magnet schools' race- conscious assignment policy constitutes a necessary safeguard against the risk that unchecked transfers to magnet schools could increase the number of racially identifiable schools in violation of the Board's continuing obligation under the desegregation orders. *See* 379 F.Supp. at 1105 ("Racially identifiable schools may not be operated."). In that vein, the *Capacchione* plaintiffs' own expert on school desegregation, Dr. David Armor, agreed that racial quotas are permissible in a desegregation plan. J.A. 3627. Dr. Armor testified that "race is an integral part of pairing, of satelliting, of magnet schools, of running lotteries for magnet schools. The entire plan is predicated on race and race controls, because that's the only way you can meet the court order and to have an effective plan is to employ race requirements and racial quotas basically for all schools." J.A. 3434.

In sum, contrary to Judge Potter's conclusion, Judge McMillan specifically authorized the use of fixed ratios based

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forward with the desegregation of its schools, but rather was a message that this previously recalcitrant school district should not use its "discretion" to take steps backward, i.e., a "material departure," from its obligation to achieve the court-ordered "goal" of "complete desegregation of the entire system to the maximum extent possible." *Swann*, 306 F.Supp. at 1298-99.

on race in assigning students to magnet schools. *See* 379 F.Supp. at 1104. Furthermore, even without such specific authorization, the broad discretion granted the Board by the Supreme Court's opinion in *Swann* and by the other court orders and injunctions governing this case permitted CMS to fashion magnet schools with racially balanced enrollments. The decrees make plain that ratios based on race were among the "means" by which the Board was authorized "to achieve the constitutional end" of desegregation. *Swann* 311 F.Supp. at 268-69; *see also Swann,* 362 F.Supp. at 1225; *Swann,* 334 F.Supp. at 631. As such, the Board did not violate the Equal Protection Clause in adopting such ratios in its expanded magnet schools program.

B.

As their principal contention, the *Capacchione* plaintiffs argue that the expanded magnet schools program was a response to demographic change rather than a true attempt to remedy past discrimination. We cannot agree.[26]

First, Judge Potter "accept[ed] that the school system was acting to ... remedy[ ] the effects of past racial discrimination" in expanding the number of magnet schools in 1992. *Capacchione,* 57 F.Supp.2d at 289. Ample record evidence supports this finding. *See, e.g.,* J.A. 2716 (testimony of John Murphy, former CMS Superintendent, that 1992 plan to expand the magnet school program was among the "creative strategies we could come up with to stay in compliance with the court order"); J.A. 3869-74 (testimony of Jeff Schiller, former assistant superintendent for research, assessment, and

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[26]Tellingly, the dissent does not even mention this argument.

planning for CMS, explaining that the 1992 student assignment plan, including the expanded magnet schools program, "had the same objectives as the one that it was going to replace, maintaining the court order," and that the objective of the expanded magnet program specifically was "to maintain the integration of schools through voluntary means"); J.A. 15503-05 (1993 letter from CMS to the U.S. Department of Education discussing Judge McMillan's 1974 order and identifying the creation of additional magnet schools as among the "more effective ways ... [to] meet[ ] the guidelines established ***409** by the Court"); J.A. 13607, 15582 (Stolee Plan recommendation that "[t]he Charlotte-Mecklenburg school desegregation plan should be gradually changed from a mandatory plan with little voluntarism to a voluntary plan with few mandatory facets").

Furthermore, the dichotomy the *Capacchione* plaintiffs suggest between "counter[ing] demographic change," on the one hand, and remedying past discrimination, on the other, oversimplifies both the law of school desegregation, particularly the Supreme Court's decisions in *Green, Swann,* and *Freeman,* and the practical reality of achieving desegregation in a large urban school district. From the early stages of the *Swann* litigation, all concerned have understood that demographic patterns would complicate the process of school desegregation. Indeed, remedies such as school busing and satellite attendance zones would never have been necessary in the first place if the demography of the community were not an obstacle to desegregation. In a sense, *Swann* 's basic teaching is that the Constitution sometimes requires schools to "counter demograph[y]" in order to achieve desegregation. The *Swann* Court noted that the process of "local authorities ... meet[ing] their constitutional obligations" had "been rendered

more difficult by changes ... in the structure and patterns of communities, the growth of student population, [and] movement of families." 402 U.S. at 14, 91 S.Ct. 1267. The Court expressed concern that "segregated residential patterns ... [would] lock the school system into the mold of separation of the races." *Id.* at 21, 91 S.Ct. 1267. Thus, CMS simply followed the Supreme Court's guidance in *Swann* in regarding change as a problem inhibiting its progress toward unitary status.[27]

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[27]The *Capacchione* plaintiffs contend that, given the obvious concern of school officials with demographic changes, "CMS could not have been motivated by any desire to comply with its court-ordered duty to eradicate vestiges of segregation." Brief of Appellees at 85. But this stands the analysis on its head. A court determines from the *effect* of their *acts*, not from their *motives*, whether school authorities comply with a desegregation decree. *See Wright v. Council of Emporia*, 407 U.S. 451, 462, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972) ("It is difficult or impossible for any court to determine the sole or dominant motivation behind choices of a group of legislators, and the same may be said of the choices of a school board.... Thus we have focused upon the effect--not the purpose or motivation--of a school board's action in determining whether it is a permissible method of dismantling a dual system.") (internal quotations marks omitted). Moreover, even if motivation were relevant, the argument would fail. A fair reading of the record demonstrates that although school officials were obviously aware of the demographic shifts, they viewed these shifts as an *obstacle* to achieving compliance with the *Swann* orders and to eliminating the vestiges of discrimination in the school system, not as the condition that itself necessitated a remedy. *See, e.g.*, J.A. 13597-98, 15572-73 (Stolee Plan identifying "a growing and moving population" as one of several factors creating instability in student assignment under the pre 1992 system of pairing and satelliting); J.A. 15504 (1993 letter from CMS to the U.S. Department of Education listing "demographic and residential patterns" as one of several increasing strains on the pairing system); J.A. 2712 (testimony of former CMS Superintendent John Murphy that "[w]e really weren't going to be bringing about desegregation and racially balanced schools unless we began to address the issue of housing at the same time.").

Moreover, *Freeman* simply did not hold, as the *Capacchione* plaintiffs necessarily imply, that demographic changes in a metropolitan area independently eliminate the ***410** vestiges of past discrimination. Nor does *Freeman* bar courts from targeting racial isolation resulting in significant part from "private choice," if that isolation is also a vestige of past discrimination. The effect of such a holding in *Freeman* would have been to overrule *Green,* which the Supreme Court did not purport to do. In *Green,* even though the school board allowed every student "freedom of choice" as to which school to attend, the formerly black school remained all black and the formerly white school remained predominantly white-wholly as a result, in some sense, of this "private choice." The *Green* Court held that, although the private choices of students and their families were responsible for the continuing racial isolation of the schools' student populations, that fact did not preclude a finding that the racial isolation was also a vestige of past discrimination. Indeed, the Court held not only that it was permissible for the school board to take further action to desegregate, but that the board was *required* to take further action in order to fulfill its "affirmative duty" to desegregate. *Green,* 391 U.S. at 437-38, 88 S.Ct. 1689.

Although *Freeman* recognized that, at a certain point in the process of desegregation, a court may determine that present racial isolation cannot be considered a by-product of the past regime of segregation, the case does not require--or even

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The Board may have chosen sites for new schools in response to, or even in furtherance of, these demographic trends, *see supra,* but in any event the Board also clearly evidenced awareness that the population changes, particularly the greater distance between white and black population centers, would put a greater strain on the process of desegregation.

empower--a school board under a judicial desegregation order to make that determination on its own. Rather, so long as CMS was under court order to desegregate, it was required to treat racial isolation in its schools as a vestige of segregation, and to take appropriate action to eliminate that vestige. *See Swann,* 402 U.S. at 26, 91 S.Ct. 1267.

C.

Finally, the *Capacchione* plaintiffs maintain that, even if CMS administered the expanded magnet schools program pursuant to and in conformity with the governing desegregation decrees, CMS violated the Constitution in doing so. Judge Potter rejected this argument, as do we (and the dissent, in never mentioning it, apparently also rejects it). The *Capacchione* plaintiffs rely on inapposite case law in attempting to establish that Board actions taken pursuant to court-ordered desegregation decrees can be held unconstitutional.

Specifically, they rely on recent decisions finding *voluntary,* race-conscious magnet school programs (not developed under a governing desegregation order) unconstitutional. *See Eisenberg v. Montgomery County Pub. Schs.,* 197 F.3d 123, 125 (4th Cir.1999); *Tuttle v. Arlington County Sch. Bd.,* 195 F.3d 698 (4th Cir.1999); *see also Wessmann v. Gittens,* 160 F.3d 790 (1st Cir.1998). In fact, the courts emphasized in those cases that the school system had *not* been under a court order to desegregate, *see Eisenberg,* 197 F.3d at 124, and had adopted a magnet program "*not* to remedy past discrimination, but rather to promote racial, ethnic, and socioeconomic diversity." *Tuttle,* 195 F.3d at 700 (emphasis added); *see also Wessmann,* 160 F.3d at 792 (noting that prior

to instituting its magnet program the school system "had achieved unitariness in the area of student assignments" and that "the district court thereupon relinquished control over" that area). Indeed, in *Eisenberg* we endorsed the *permissibility* of race-based classifications "in situations," like that at hand, "where past constitutional violations require race-based remedial action." 197 F.3d at 130 (citing *Swann,* 402 U.S. at 1, 91 S.Ct. 1267); *see also Wessmann,* 160 F.3d at 795.

The distinction between a unitary school system and a school system under court order to desegregate is, from a legal ***411** standpoint, fundamental. Furthermore, as discussed *supra,* it is the judicial finding of unitary status, not any particular action by the school board or condition in the school system, upon which the distinction turns. Of course, for a formerly segregated school system, the attainment of unitary status reflects years or decades of gradual change, not an overnight shift in policy or outlook. Although CMS will not look much different the day it becomes unitary than it will have looked the previous day, attainment of unitary status triggers significant legal consequences. In a nonunitary school system, all one-race or predominantly one-race schools are presumed to be vestiges of segregation, and the burden is on the challenging party to show that those schools are nondiscriminatory. *See Swann,* 402 U.S. at 26, 91 S.Ct. 1267 ("The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."). Once a court has declared a school system unitary, on the other hand, the presumption is that the vestiges of segregation have been eliminated, and a plaintiff seeking to demonstrate a constitutional violation on the basis of the existence of one-race or predominantly one-race schools

must "prove discriminatory intent on the part of the school board." *Riddick*, 784 F.2d at 537.

As Judge Potter recognized, *see Capacchione*, 57 F.Supp.2d at 285, CMS implemented and administered its expanded magnet schools program *prior* to ever achieving unitary status and while still *under court order* to remedy the vestiges of segregation. Therefore, recent decisions, like *Eisenberg* and *Tuttle*, addressing the constitutionality of magnet school assignment policies in unitary school systems *not* under court order, are simply inapposite.

Moreover, even if *Tuttle* and *Eisenberg* generally applied to governmental acts performed pursuant to remedial desegregation orders (which they do not), the Board's expanded magnet schools program would withstand constitutional scrutiny. This is so because if a precedent of the Supreme Court "has direct application in a case," inferior courts must follow that precedent "even if later cases appear to call it into question, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

There could hardly be a clearer case for application of this principle. Here, the SupremeCourt's *Swann* decision itself constitutes directly controlling precedent. In *Swann*, the Court concluded that CMS could be constitutionally required to make efforts "to reach a 71-29 ratio" in the schools under its authority, and to assign students "in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." *See* 402 U.S. at 23-25, 91 S.Ct. 1267 (approving Judge McMillan's order). Indeed, the Supreme Court again noted in *Freeman* that

its decision in *Swann* specifically approved racial balancing by CMS to achieve the remedial end of eliminating the vestiges of segregation. 503 U.S. at 493, 112 S.Ct. 1430 (In *Swann,* "[w]e confirmed that racial balance in school assignments was a necessary part of the remedy in the circumstances there presented."). Under the principle articulated in *Agostini,* only the Supreme Court itself can modify the decrees in this case to prohibit what *Swann* so clearly permitted.

D.

The Supreme Court's decision in *Swann* is the law of the case; it must be followed. ***412** But more than just the law of this case, for almost thirty years *Swann* also has functioned as a blueprint for school desegregation in school districts throughout this Nation. As long as *Swann* is controlling law, and as long as the Board acts pursuant to the *Swann* desegregation orders--as it did in implementing the expanded magnet schools program--it cannot be held to have violated the Constitution.

IV.

Judge Potter also enjoined CMS from "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race." *Capacchione,* 57 F.Supp.2d at 294. In considering the propriety of an injunction, we review factual findings only for clear error, but the "district court's application of legal principles ... presents a legal question reviewed *de novo.*" *North Carolina v. City of Virginia Beach,* 951 F.2d 596, 601 (4th Cir.1992).

Given the Court's holding today that CMS did not violate the constitutional rights of the *Capacchione* plaintiffs by consideration of race in its expanded magnet schools program, and because we would also hold that CMS has not yet achieved unitary status, there is, in our view, no legal basis for the district court's injunction. Moreover, even if the district court properly determined that CMS had attained unitary status, the injunction still must be vacated. This is so because the district court could issue an injunction only to the extent that it concluded that CMS was likely to persist in current practices that would violate the Constitution if undertaken outside of the remedial context. *See United States v. Oregon State Med. Soc'y,* 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952). Judge Potter made no such finding.

Indeed, the only CMS action that Judge Potter held to violate the Constitution was the expanded magnet schools program (a holding that this Court has now reversed); the judge did not consider the constitutionality of any other method of student assignment or resource allocation. Yet the injunction by its terms prohibits any consideration of race by CMS in student assignment or allocation of educational benefits that "den[ies] students an equal footing." *Capacchione,* 57 F.Supp.2d at 294. The injunction thus goes much further than simply prohibiting CMS from reinstituting the expanded magnet schools program and its race-conscious assignment policy.

This court has repeatedly held similar injunctions too broad, explaining that "[a]lthough injunctive relief should be designed to grant the relief needed to remedy the injury to the prevailing party, it should not go beyond the extent of the established violation." *Hayes,* 10 F.3d at 217; *see also Tuttle,*

195 F.3d at 708. Similarly, the Supreme Court has directed "[f]ederal court decrees must directly address and relate to the constitutional violation itself." *Milliken,* 433 U.S. at 282, 97 S.Ct. 2749. Because the injunction issued in this case did not do this, it must be vacated.

V.

In addition to injunctive relief, the district court awarded nominal damages of one dollar to the *Capacchione* plaintiffs "to vindicate the constitutional rights of children denied an equal footing in applying to magnet schools." *Capacchione,* 57 F.Supp.2d at 290. Because a majority of the Court holds that the expanded magnet schools program did not violate the Constitution, it follows that the nominal damages award must also be vacated.

***413** VI.

The district court awarded the *Capacchione* plaintiffs $1,499,016.47, plus interest, in attorney's fees, pursuant to 42 U.S.C. § 1988 (1994). *See Capacchione v. Charlotte-Mecklenburg Schs.,* 80 F.Supp.2d 557 (W.D.N.C.1999) (amended by orders of December 16, 1999, J.A. 1313-15, and March 6, 2000, J.A. 1356-62). Under § 1988, a court is only permitted to award fees when a "party, other than the United States" prevails in an "action to enforce" the Constitution or specific federal civil rights statutes. 42 U.S.C. § 1988. Because the *Capacchione* plaintiffs have not prevailed on any constitutional or other claim providing a basis for statutory attorney's fees, the $1.49 million fee award must be vacated in its entirety.

We note initially that this Court's reversal of the district court's finding that CMS's magnet schools program violates the Constitution obviously means that all attorney's fees awarded in connection with the *Capacchione* plaintiffs' previous success on this issue must be vacated. The district court apparently based much of its attorney's fees award on this ground. *See Capacchione*, 80 F.Supp.2d. at 559 (awarding attorney's fees in part because the "Court found for Plaintiff Capacchione on the *core of his claim* that CMS violated Cristina Capacchione's constitutional rights under the Equal Protection Clause") (emphasis added). Our Court today not only holds that CMS did not violate the *Capacchione* plaintiffs' constitutional rights in adopting the expanded magnet schools program, but also reverses and vacates the district court's attendant orders for injunctive and monetary relief. As the *Capacchione* plaintiffs themselves recognize, it is "self-evident" that they cannot recover attorney's fees "if this Court reverses on the order appealed from." Brief of Appellees at 113 n. 51. Given the reversal of the magnet schools ruling, the award of attorney's fees attendant to it must be vacated.

The dissent maintains, however, that because this Court has also upheld Judge Potter's unitary status ruling, the *Capacchione* plaintiffs are entitled to an award of *some* attorney's fees. *See* Traxler Op. at 66.[28] Our Court properly

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[28]Contrary to the dissent's contentions, CMS did not concede that if the Grant intervenors obtained *only* a declaration of unitary status, without an injunction or determination that CMS violated the Constitution, they would be entitled to attorney's fees. CMS actually stated:

> Unlike Capacchione, the Grant intervenors were granted declaratory and injunctive relief related to the issues of unitary status *and CMS' magnet school admission policies.* Therefore, the

rejects this notion because the unitary status determination alone simply provides no basis for an award of attorney's fees. *See also* Wilkinson Op. at 353 & n. 1.

Just a few weeks ago, the Supreme Court removed all doubt in this area. In *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598, 121 S.Ct. 1835, 1839, 149 L.Ed.2d 855 (2001), the Court reiterated that "[i]n the United States, parties are ordinarily required to bear their own attorney's fees--the prevailing party is not entitled to collect from the loser." In accord with the traditional "American Rule," courts may not award attorney's fees to ***414** the prevailing party absent explicit statutory authority. *See id.* (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994)). Indeed, in *Buckhannon*, the Supreme Court noted that statutory authority to award attorney's fees is critical, for "Congress ha[s] not 'extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.'" *Buckhannon*, 121 S.Ct at 1843 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)).

In this case, there is simply no statutory basis for an award of fees to the *Capacchione* plaintiffs on the sole issue

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entitlement of the Grant intervenors to recover attorneys' fees is tied directly to the merits of those claims.

Brief of Appellants at 40 (emphasized language omitted in dissent, *see* Traxler Op. at 66). Of course, no plaintiff prevailed on the claim that the "magnet school admission policies" violated the Constitution, or any other claim that provided a statutory basis for attorney's fees. Moreover, even if CMS had conceded to the contrary, there would be no basis for a fee award.

on which they have prevailed, namely the unitary status determination. Although a majority of this Court has regrettably, and we believe mistakenly, determined that CMS has attained unitary status, no member of the Court suggests that in doing so, or in not doing so sooner, CMS violated 42 U.S.C. §§ 1981, 1983, 2000d, the Fourteenth Amendment of the Constitution, or any other law or constitutional provision that would give rise to an award of attorney's fees under § 1988 or any other statute.[29] While some of the *Capacchione* plaintiffs had alleged that CMS's failure to obtain a declaration that it had attained unitary status violated their constitutional rights, Judge Potter *never so held.* Tellingly, on appeal, the *Capacchione* plaintiffs do not assert this position, let alone offer any support for it. Nor does any member of this Court embrace this unprecedented theory. Thus, there is no basis for an award of attorney's fees here.

We note that, even if § 1988 somehow applied to a mere finding of unitary status, absent some additional finding of a constitutional or civil rights violation, the *Capacchione* plaintiffs would still not be entitled to attorney's fees because they do not qualify as "prevailing part[ies]." In order to be a "prevailing party," a party seeking fees must have obtained "an enforceable judgment ... consent decree or settlement." *Farrar v. Hobby,* 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Additionally, there must be some defendant in the case who has been "prevailed against," *id.* at 109, 113 S.Ct. 566,

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[29]We note that if CMS itself had succeeded in simply obtaining a declaration that its school system was now unitary, no one would contend that the Board would be entitled to an award of fees. Given this, how can the *Capacchione* plaintiffs, operating as a "private attorneys general" on behalf of the Board, Traxler Op. at 68, be entitled to fees?

with a resulting "material alteration of the legal relationship" between that defendant and the party seeking fees, *id.* at 111, 113 S.Ct. 566.

This prevailing party requirement is crucial: in *Buckhannon,* the Supreme Court rejected the so-called "catalyst theory" of attorney's fees on the ground that it might permit an award "where there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon,* 121 S.Ct. at 1840. By simply obtaining a declaration that the Board has achieved unitary status, the *Capacchione* plaintiffs have not obtained "an enforceable judgment, consent decree, or settlement;" they have not "prevailed against" CMS; nor have they effected a "material alteration of the legal relationship" between the parties.

Indeed, the declaration of unitary status merely restores the parties to the status quo prior to the issuance of the desegregation decree. Such a declaration does not constitute "an enforceable judgment" for the *Capacchione* plaintiffs. The dissent is mistaken in its assertion that a unitary status declaration is "enforceable against ***415** CMS in the unlikely event it later attempts to continue prior assignment policies." Traxler Op. at 68. Any challenge to future race-based assignment policies would be on the ground that they violate the Constitution, not that they violate a declaration of unitary status. Thus, a future challenge would seek to "enforce" the Constitution, not the unitary status determination. This point highlights the heart of the dissent's misunderstanding. Section 1988 exists to provide attorney's fees for those plaintiffs who demonstrate that they suffered deprivations of rights under federal civil rights laws or the Constitution. Today, a majority of this Court has held that the *Capacchione* plaintiffs have

suffered no such deprivation; thus, they are not entitled to statutory attorney's fees.

Although the declaration of unitary status represents a rejection of the legal position that CMS has taken in this litigation, such a defeat is not tantamount to being "prevailed against" under § 1988. *See Buckhannon,* 121 S.Ct. at 1841 ("We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who ... has reached the 'sought- after destination' without obtaining any judicial relief."). Rather, the primary significance of a declaration of unitary status is that CMS has been successful; it has eradicated the vestiges of past discrimination to the extent practicable and, as the *Capacchione* plaintiffs put it, obtained a "return of control to local authorities." Brief of Appellees at 34. The Board, upon a declaration of unitariness, now actually has wider latitude to assign students than it did while it was under court order to remedy past discrimination (although certain race-conscious policies might no longer be permissible). Accordingly, this declaration of Board success, and attendant broadening of the Board's discretion, does not constitute an alteration of the parties' legal relationship "in a way that *directly benefits* the plaintiff." *Farrar,* 506 U.S. at 112, 113 S.Ct. 566 (emphasis added). Without more, the declaration that CMS has achieved unitary status does not place any direct benefit on the *Capacchione* plaintiffs, who "obtain[ ] nothing from the defendants." *Hewitt v. Helms,* 482 U.S. 755, 761-62, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987).[30]

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[30]The dissent's contention that the *Capacchione* plaintiffs helped "in making unitariness a reality" underscores the dissent's confusion as to the difference between seeking injunctive relief to eliminate illegal segregation connected with a dual school system with a declaration that this

Moreover, "only those changes in a defendant's conduct *which are mandated* by a judgment ... in the case at bar may be considered by the court in determining the plaintiff's success at trial" for purposes of attorney's fees under § 1988. *Clark v. Sims*, 28 F.3d 420 (4th Cir.1994) (emphasis added). In affirming the district court's unitary status determination, this Court does not mandate that CMS engage in any "conduct" whatsoever, but simply holds that "CMS has complied in good faith with the mandate of *Brown*," and that the "dual system has been dismantled." Traxler Op. at 43. By vacating the award of nominal damages and injunctive relief, this Court has removed any "mandate" on the actions of the district court. Having been determined to be unitary, CMS is now free to take whatever action it wishes consistent with the Constitution.

Thus, the *Capacchione* plaintiffs' suit seeking a declaration of unitary status was ***416** not an "action to enforce" the civil rights laws under § 1988. Rather, these plaintiffs sought a declaration that CMS has complied with judgments obtained by the *Swann* plaintiffs in *previous actions* to enforce civil rights. Although the *Capacchione* plaintiffs brought separate § 1983 claims asserting that the expanded magnet schools program violated the Equal Protection Clause, they have not "prevail[ed]" on those claims.

In sum, not only is there no statutory authority to award attorney's fees here, but even if such authority were present, the *Capacchione* plaintiffs are not prevailing parties under § 1988.

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has been done. The former is an action to "enforce" civil rights laws and the Constitution--and therefore contemplated by § 1988--and the latter is a statement that earlier enforcement efforts have succeeded for reasons having nothing to do with the *Capacchione* plaintiffs' lawsuit.

For these reasons, there is no basis for an award of any attorney's fees in this case.

VII.

Finally, CMS appeals the district court's order awarding sanctions--including legal fees and costs--to the *Capacchione* plaintiffs arising from a discovery dispute. In the months before trial, CMS did not respond to interrogatories by the *Capacchione* plaintiffs seeking disclosure of fact witnesses. Instead, the Board waited until the week before trial to reveal the names of most of its fact witnesses, providing the *Capacchione* plaintiffs with a list of 174 names which it ultimately narrowed to twenty-six potential witnesses. The Board maintains that its actions complied with the district court's pretrial order, which required the parties to provide a list of fact witnesses to each other "[n]o later than the morning of the first day of trial." J.A. 150.

The district court, however, granted the *Capacchione* plaintiffs' motion for sanctions. The court held that it had established the rules for disclosure of fact witnesses in an order of September 1998, which superseded the pretrial order. The September 1998 order denied the *Capacchione* plaintiffs' motion to compel disclosure of witnesses prior to the date established in the pretrial order for disclosure of expert witnesses, but the court stated that "CMS must supplement its responses, as it promised, when such information becomes known." J.A. 195. In awarding sanctions, the district court also indicated its concern that CMS had been "lacking candor in disclosing relevant and important information" during the pretrial stage, that the disclosure of a list of 174 potential witnesses in the week before trial was "extremely prejudicial to

opposing counsel," and that many of the witnesses on the list may have been "irrelevant or unnecessarily cumulative." J.A. 305. As a result, the district court ordered a one-week recess after the *Capacchione* plaintiffs' presentation at trial to allow them to depose, at the school system's expense, any of the twenty-six witnesses on the Board's revised list. Witnesses whom the Board did not make available for deposition or interview during the mid- trial recess were barred from testifying.

"Rule 37(d) of the Federal Rules of Civil Procedure gives the district court wide discretion to impose sanctions for a party's failure to comply with its discovery orders." *Mutual Fed. Sav. & Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88, 92 (4th Cir.1989). CMS could plausibly have understood the deadline for disclosure of fact witnesses contained in the pretrial order to have continued in effect after the subsequent September 1998 order given that the subsequent order's central effect was to *reaffirm* the deadline contained in the pretrial order for disclosure of expert witnesses. Nonetheless, we cannot say that the district court abused its broad discretion in finding that its September 1998 order did in fact supersede the pretrial order, and that the Board's pretrial conduct had been unnecessarily *417 dilatory and prejudicial to the *Capacchione* plaintiffs. Therefore the order of sanctions against CMS must be affirmed.

VIII.

We must and do sympathize with those who are impatient with continued federal court involvement in the operation of local schools. One might consider thirty-five years a long time for a school district to operate under judicial

desegregation decrees. However, when the Supreme Court decided *Swann* in 1971 no one could reasonably have thought that the substantial task described there would be quickly or easily accomplished. CMS, which maintained a separate, decidedly unequal dual educational system for decades--and which mightily resisted desegregation of any sort for years after it became the law of the land--has come a long way. Although CMS has now achieved unitary status in certain respects, the record in this case simply does not support a determination that the process of desegregation is at an end.

For more than a hundred years, in fits and starts, our nation has attempted to undo the effects of its shameful heritage of slavery. For nearly fifty years, federal courts have struggled with the task of dismantling legally enforced racial segregation in many of our schools. This task has given rise to one of the preeminent issues of constitutional law in our time. We do not yet know how history will regard the courts' role in adjudicating and presiding over the desegregation of schools. It may be seen as a brief and unfortunate jurisprudential anomaly, justified only by the immediacy of the evil it was intended to uproot, *cf. Freeman*, 503 U.S. at 505-07, 112 S.Ct. 1430 (Scalia, J., concurring); or it may be recognized as the necessarily sustained effort to eradicate deep-seated vestiges of racial discrimination and to vindicate the promise of the Fourteenth Amendment, *cf. Dowell*, 498 U.S. at 266-68, 111 S.Ct. 630 (Marshall, J., dissenting); or it may be viewed in some other way that we cannot now anticipate.

But we are certain that the end of this great task must be accomplished in an orderly manner, consistent with and true to its origin. We are certain, too, that if the courts, at some point, come to view the effort to eliminate the vestiges of segregation

as having been overly "race-conscious," they must do so with a clear assessment of the historical record.

Race neutrality, of course, represents one of our constitutional ideals. Properly understood, it is an ideal not at all in tension with our obligation as a society to undo the effects of slavery and of the racial caste system that was perpetuated, for more than a century, in slavery's wake. But we must be ever mindful, as we strive for race neutrality, that a reductive and willfully a historical conception of race neutrality was, in an earlier era, used as a blunt instrument against the aspirations of African-Americans merely seeking to claim entitlement to full citizenship.

In striking down early civil rights legislation, the Supreme Court embraced this misconceived race neutrality, reasoning, only twenty years after the issuance of the Emancipation Proclamation, that the legislation at issue would illegitimately make black citizens "the special favorite of the laws." *Civil Rights Cases,* 109 U.S. 3, 25, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Indeed, the system of segregation with which we are concerned was justified at its inception by a particular conception of race neutrality--that a regime of racial separation could be constitutionally justified so long as it applied neutrally and equally to persons of all races. *See Plessy v. Ferguson,* 163 U.S. 537, 551, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) ("We consider the underlying *418 fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.").

The first Justice Harlan, dissenting in *Plessy,* declared our Constitution to be "color-blind," *id.,* 163 U.S. at 559, 16 S.Ct. 1138, and in doing so provided one of the most famous

and compelling articulations of the constitutional guarantee of equality. But in urging us to be "blind" to race, Justice Harlan did not, as is sometimes suggested, suggest that we be ignorant of it. In *Plessy,* he was the only member of the Court willing to acknowledge the most obvious truth about segregation: "Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons." *Id.* at 557, 16 S.Ct. 1138. Thirteen years earlier, dissenting in the *Civil Rights Cases,* Justice Harlan rejected the notion that civil rights legislation made blacks a "special favorite of the laws," *id.,* 109 U.S. at 61, 3 S.Ct. 18, and he criticized the majority's reasoning as "narrow and artificial." *Id.* at 26, 3 S.Ct. 18.

We recognize now, as Justice Harlan recognized then, that no simple syllogism can enfold all of history's burdens and complexities. Eliminating race-consciousness from government decision making must be regarded as among our worthiest constitutional aspirations. But that aspiration surely cannot be so rigid that it refuses to distinguish the "race consciousness" that created a segregated school system and the race-conscious efforts necessary to eliminate that system. While most judges are not historians, we must be willing to acknowledge and confront our history. If we fail to do so, we risk falling into a mode that equates the cure with the disease: civil rights with favoritism, desegregation with segregation. As American citizens, we know better.

We are honored to state that Judge Michael and Judge Gregory join in this opinion.

Opinion of the District Court of September 9, 1999

United States District Court, W.D. North Carolina,
Charlotte Division.

William CAPACCHIONE, Individually and on Behalf of Cristina Capacchione, a Minor, Plaintiff,
and
Michael P. Grant et al., Plaintiff-Intervenors,
v.
CHARLOTTE-MECKLENBURG SCHOOLS et al.,
Defendants.

James E. Swann et al., Plaintiffs,
v.
Charlotte-Mecklenburg Board of Education et al.,
Defendants.

Nos. 3:97-CV-482-P, 3:65-CV-1974-P.

Sept. 9, 1999.

[57 F. Supp. 2d 228]

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MEMORANDUM OF DECISION AND ORDER

ROBERT D. POTTER, Senior District Judge

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*232 INTRODUCTION

Three decades ago, this Court-and ultimately the United States Supreme Court-provided the constitutional imprimatur for ordering local school systems to bus children away from their neighborhood schools in order to remedy the past vestiges of unlawful segregation. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The usurpation of a local school system's student assignment policies by a federal court was an extraordinary event. As the Supreme Court has observed: "No single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069 (1974) ("*Milliken I*"). Nevertheless, this Court's exercise of its equity power was deemed necessary to eliminate the conditions and redress the injuries caused by the "dual school system." The injunction entered by this Court, like any temporary equitable remedy, eventually must reach an end. Today, this Court decides whether the Defendant Charlotte-Mecklenburg Schools ("CMS"[1] has reached that end by creating a "unitary school

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[1]Although originally sued in the *Swann* case as "the Charlotte-Mecklenburg Board of Education," the school system is now commonly referred to as "Charlotte-Mecklenburg Schools" or "CMS." For simplicity,

system."

CMS takes a bizarre posture in this late phase of the case, arguing that it has not complied with the Court's orders. In 1965, when the *Swann* litigation began, CMS strongly resisted federal supervision, but, today, the school system is equally fervent in resisting the removal of the desegregation order because it now wishes to use that order as a pretext to pursue race-conscious, diversity-enhancing policies in perpetuity. Consequently, CMS, the defendants, are now allied with the original class action plaintiffs who represent parents of black children in the district (the "Swann Plaintiffs"[2]). A separate group of parents of children in the school system (collectively referred to as the "Plaintiff-Intervenors") seek an end to CMS's use of race-based policies.

After an extensive, two-month evidentiary trial, the Court is convinced that CMS, to the extent reasonably practicable, has complied with the thirty-year- old desegregation order in good faith; that racial imbalances existing in schools today are no longer vestiges of the dual system; and that it is unlikely that the school board will return to an intentionally-segregative system. For the reasons set forth below, the Court finds that CMS has achieved unitary

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the Court will refer to the school system as "CMS" throughout the opinion.

[2]Not surprisingly, the original plaintiffs in *Swann* no longer have children attending schools in the district. Therefore, after the Court reactivated *Swann*, counsel for the original Swann Plaintiffs substituted as class representatives Terry Belk and Dwayne Collins, both of whom have children in the CMS system. (Order of 9/16/98 at 2.) Walter Gregory also was named as a substituted party but lost standing after he moved his family out of the state. (Order of 2/22/99 at 2.)

status in all respects and therefore dissolves the desegregation order. The Court also finds that certain CMS student assignment practices went beyond constitutionally permissible bounds. Finally, to the extent that the continued use of certain race-based policies would violate the commands of the Equal Protection Clause absent a remedial purpose, such practices by CMS are hereinafter prohibited.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *Swann v. Charlotte-Mecklenburg Board of Education*

In 1954, the Supreme Court announced that the doctrine of "separate but equal" was unconstitutional, thereby prohibiting state-sponsored racial separation in public schools. *233*Brownv. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954) ("*Brown I*"). In a subsequent decision, the Supreme Court further mandated desegregation "with all deliberate speed." *Brown v. Board of Educ.*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) ("*Brown II*"). Despite the holdings of *Brown I* and *Brown II* many public school systems, particularly in the South, resisted taking any positive steps toward desegregation. *See generally* Geoffrey R. Stone et al., *Constitutional Law* 533 (3d ed. 1996); James R. Dunn, *Title VI. The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42, 42 (1967). The Charlotte-Mecklenburg school district in North Carolina-where, prior to *Brown*, public schools had been segregated on the basis of race as a matter of state law and school board policy-was likewise slow to dismantle its dual school system. *See generally Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F.Supp. 1358 (W.D.N.C.1969) (detailing the history of segregation in Charlotte, North Carolina).

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In 1965, the Swann Plaintiffs filed their complaint for injunctive relief in this Court, claiming that the policies and practices of the Charlotte- Mecklenburg Board of Education were perpetuating a segregated school system. On July 14, 1965, United States District Judge Braxton Craven, Jr., presiding over the case, approved a school board-proposed desegregation plan that closed certain all-black schools, built some new schools, established school zones based on neighborhoods, and allowed for students of any race to freely transfer to a school of his or her choice. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 243 F.Supp. 667 (W.D.N.C.1965), *aff'd*, 369 F.2d 29 (1966).

"Freedom of choice" transfer plans were a common response to the mandate of *Brown*,[3] but such policies had little effect on dismantling the dual systems. Dunn, *supra*, at 44. Only a small number of black children transferred to predominately white schools, and predominately black schools remained all or predominately black. *Id.* The Supreme Court addressed this concern in *Green v. County School Bd.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), holding that " 'freedom of choice' is not an end in itself;" rather, "it is only a means to a constitutionally required end." *Id.* at 440, 88 S. Ct. at 1695 (citation omitted). "If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end." *Id.* Thus, *Green* established that

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[3]In fact, the use of freedom of choice was explicitly endorsed by the United States Department of Health, Education, and Welfare (HEW). U.S. Office of Education, HEW, General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools (April 1965); *see United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 889 (5th Cir.1966).

a school system which had been enforcing *de jure* segregation at the time of *Brown* had an "affirmative duty" to desegregate, not merely an obligation to implement race-neutral policies. *Id.* at 437-38, 88 S.Ct. at 1694. *Green* also identified six areas of school operations that must be free from racial discrimination before the mandate of *Brown* is met: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. *Id.*, at 435, 88 S. Ct. at 1693. These are commonly referred to as the "*Green* factors."

In 1968, the Swann Plaintiffs filed a motion for further relief, seeking greater speed in desegregation efforts in the spirit of *Green*. On April 23, 1969, following a six-day hearing, United States District Judge James B. McMillan, newly assigned to the case,[4] ruled that the plan based upon geographic zoning with a free-transfer *234 provision had left the dual school system virtually intact. *Swann*, 300 F.Supp. at 1372. The Court also concluded, however, that no racial discrimination or inequality was found in the following areas:

> the use of federal finds; the use of mobile classrooms; quality of school buildings and facilities; athletics; PTA activities; school fees; free lunches; books; elective courses; [and] in individual evaluation of students.

Id. As to those areas where vestiges of discrimination were found to still exist-primarily, student and faculty

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[4]Judge Craven was subsequently appointed to the United States Court of Appeals for the Fourth Circuit. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 135 (4th Cir.1970) (recusing himself in subsequent appellate review of Swann litigation).

assignment-the Court directed the school board to submit a more aggressive desegregation plan and outlined the preferred changes, including busing, re-zoning, and other methods. *Id.* at 1373. The Court was hesitant to mandate precise racial quotas, stating: "This court does not feel that it has the power to make such a specific order." *Id.* at 1371.

At first, the school board was slow to act on the Court's recommendations. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F.Supp. 1381, 1382 (W.D.N.C.1969) (noting the "foot-dragging" by the board). On August 15, 1969, the Court approved an interim plan that included programs for faculty desegregation and for closing seven all-black schools and assigning their pupils to outlying predominately white schools. *Swann v. Charlotte- Mecklenburg Bd. of Educ.*, 306 F.Supp. 1291, 1298-99 (W.D.N.C.1969). The Court noted that the plan represented substantial progress but expressed reservations that a disproportionate burden of desegregation was being placed on black children. *Id.* at 1298.

By November 1969, the Court reviewed the plan and determined that it had "not been carried out as advertised." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F.Supp. 1299, 1302 (W.D.N.C.1969). The Court also disapproved of an amended plan because it suffered from the same defects in the previously- approved plan, i.e., it stated no definable desegregation goals and did not safeguard against resegregation. *Id.* at 1313. Concluding that the board had "shown no intention to comply by any particular time with the constitutional mandate to desegregate the schools," *id.* at 1306, the Court announced that it would designate a consultant to immediately prepare a desegregation plan. *Id.* at 1313-14.

On December 2, 1969, the Court appointed Dr. John A. Finger, Jr.,[5] to study the system and to recommend a desegregation plan. The school board also prepared a plan. On February 5, 1970, after two days of hearings, the Court adopted Dr. Finger's plan for elementary schools and the board's plan, as modified by Dr. Finger, for secondary schools (the "Finger Plan"). *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F.Supp. 265, 268- 70 (W.D.N.C.1970). The Court ordered immediate compliance with the Finger Plan, which was the only plan ever mandated by the Court. The plan required the following:

- Similar to the 1969 board-proposed plan, the assignment of faculty at each school had to approximate the same ratio of black and white faculty members throughout the system. *Id.* at 268.
- The overall competence of teachers at formerly black schools could not be inferior to those at formerly white schools. *Id.*
- Students had to be assigned "in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." *Id.*
- *235"[N]o school [could] be operated with an all-black

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[5]Dr. Finger, an expert in education administration from Providence, Rhode Island, had served as a witness for the Swarm Plaintiffs and thus had a familiarity with the case. The Fourth Circuit later cautioned that courts should avoid appointing a person who has appeared as a witness for one of the parties but determined that the error, if any, was harmless. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138, 147-48 (4th Cir.1970).

or predominately black student body." *Id.*

- In redrawing the school system's attendance zones, the Court authorized the use of bus transportation and noncontiguous "satellite zones" to accomplish its goals. *Id.*
- The student transfer policy was restricted in order to safeguard against any resegregation. *Id.* at 268-69.
- Finally, the board was required to monitor and report on its progress in implementing the plan. *Id.*

The school board appealed the ruling, and the Fourth Circuit affirmed the District Court as to faculty desegregation and the secondary school plans but vacated the order as to elementary schools, determining that the provisions for pairing and grouping[6] elementary schools imposed an undue burden on the board. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138 (4th Cir.1970). The Fourth Circuit remanded the case for reconsideration and submission of additional plans. *Id.* The Supreme Court granted certiorari and reinstated the District Court's judgment pending further proceedings. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 399 U.S. 926, 90 S.Ct. 2247, 26 L. Ed.2d 791 (1970). On remand, Judge McMillan conducted eight more days of hearings, and, after reviewing the various options, he concluded that the Finger Plan was not unreasonable. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F.Supp. 786, 788 (W.D.N.C.1970). Thus, the District Court again directed the board to implement the Finger Plan

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[6]The technique of grouping and pairing involved matching an outlying white school attendance area with an inner-city black school attendance area, transporting black students from grades one through three to the outlying school, and transporting white students from the fourth through sixth grades to the inner-city black school.

and also provided suggestions for successful implementation. *Id.* at 802-03.

In 1971, the Supreme Court reviewed the case to address the scope of authority of federal courts to enforce the mandates of *Brown* and *Green*, *Swann*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554. Holding that district courts have broad equitable powers to fashion remedies to eliminate segregated public schools that were established and maintained by state action, the Supreme Court affirmed Judge McMillan's order. *Id.* at 15, 91 S.Ct. at 1276; *see id.*, at 15-16, 91 S. Ct. at 1276 ("[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.").

Chief Justice Burger, writing for the unanimous court, stated that student assignment was the central issue involved in crafting desegregation orders, and he enunciated guidelines for four identified problems areas. *Id.* at 22, 91 S.Ct. at 1279.

> 1. With regard to racial balances or quotas, the limited use of mathematical ratios of white to black students is permissible "as a starting point" but not as "an inflexible requirement." *Id.* at 22-25, 91 S.Ct. at 1279-80.
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> 2. The existence of "one-race, or virtually one-race, schools" does not necessarily mean that desegregation has not been accomplished, but such schools "in a district of mixed population" should receive close scrutiny to determine that assignments are not part of state-enforced segregation. *Id.* at 25-27, 91 S.Ct. at 1280-81.

3. The remedial altering of attendance zones, including the pairing and grouping of noncontiguous zones, is not, as "an interim corrective measure," beyond the remedial powers of a district court. *Id.* at 27-29, 91 S.Ct. at 1281-82.

4. The use of bus transportation to implement a remedial decree is permissible so long as "the time or distance of travel is [not] so great as to either risk the health of the children or significantly *236 impinge on the educational process." *Id.* at 29-31, 91 S.Ct. at 1282-83.

With the affirmation of the Supreme Court, the District Court continued its supervision of the Charlotte-Mecklenburg school system but still encountered some difficulties. In the months following the Supreme Court decision, the Court had to make some adjustments and revisions to the desegregation plan and continued to express its dissatisfaction with the regressive and unstable nature and results of certain aspects of the plan. *See Swann v. Charlotte- Mecklenburg Bd. of Educ.*, 328 F.Supp. 1346 (W.D.N.C.1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 334 F.Supp. 623 (W.D.N.C.1971). The Court kept a "hands off" approach during the 1971-72 and 1972-73 school years, in the hope that the board and its staff would undertake constructive remedial action. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 362 F.Supp. 1223, 1230 (W.D.N.C.1973). By June 19, 1973, the Court observed that "schools in most areas reached a condition of relative educational and racial stability" but again found signs of continuing discrimination. *Id.*, at 1230-37.

On July 30, 1974, the Court announced that the board

was finally on its way to producing a unitary school system. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F.Supp. 1102, 1103 (W.D.N.C.1974). The Court approved a new set of board-adopted guidelines and policies that marked "a clean break with the essentially 'reluctant' attitude which dominated Board actions for many years." *Id.* The Court stated: "If implemented according to their stated principles, they will produce a 'unitary' (whatever that is) school system." *Id.* The proposal--dubbed the "CAG Plan" because it was drafted by the Citizens Advisory Group-was intended to result in no school with a majority of minority students, with the exception of Hidden Valley Elementary School, which was exempted due to its unique history and its location in a recently integrated neighborhood. *Id.* at 1104. The proposal also allowed for the creation of "optional schools" that would be "open to all county residents and have about or above 20% black students." *Id.* Furthermore, under the CAG Plan, the burdens of busing were more equally distributed between blacks and whites, and safeguards would be implemented to prevent adverse trends in racial make-ups of schools. *Id.*

The board successfully implemented the new guidelines and policies, and, on July 11, 1975, the Court closed Swann as an active matter of litigation and removed the case from the docket. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 67 F.R.D. 648, 649 (W.D.N.C.1975). In this final order, which was referred to by Judge McMillan as the "Swann Song," the Court noted:

> The new Board has taken a more positive attitude toward desegregation and has at last openly supported affirmative action to cope with recurrent racial problems in pupil assignment. Though continuing

> problems remain, as hangovers from previous active discrimination, defendants are actively and intelligently addressing these problems without court intervention.

Id. The Court added that the case could be re-opened upon a proper showing that the orders were not being observed, although such action was not anticipated. *Id.*

B. 1975-1998: *Swann* Inactive

The *Swann* case remained inactive from 1975 until the present litigation. During this time, Mecklenburg County saw significant population growth and demographic change. The total population of Mecklenburg County has grown from 354,656 in 1970 to 613,310 in 1997. (PX 138 Table I (Clark Rpt.).)[7] According to 1998 census *237 figures, Charlotte is the twenty-fifth largest city in America and ranks second in population growth in the 1990s among cities with more than 500,000 people. U.S. Census Bureau, Population Estimates for Cities with Populations of 100,000 and Greater (released June 30,1999) <http://www.census.gov/ population/ www/estimates/citypop.html>. The racial composition of the county has changed from 76% white and 24% black in 1970 to 68% white, 27% black, and 5% other in 1997. (PX 138 Table I (Clark Rpt.).) This "other" category, which has doubled since 1990, reflects the county's large gains in Asians and Hispanics. (*Id.* at 2.)

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[7]Trial exhibits are cited throughout as "PX" for the Plaintiff-Intervenors' exhibits, "DX" for the Swann Plaintiffs' exhibits, and "DX" for CMS's exhibits. Transcripts of the hearing held from April 19, 1999, through June 22, 1999, are cited throughout by date, page, and witness.

Similar to most large metropolitan areas, Charlotte has experienced an outward growth of its population from the inner city into the peripheral areas of the county.[8] (PX 138 Figs. 2-8 (Clark Rpt.).) The highest level of population growth in the county has been in the southern and southeastern regions and, to a lesser extent, in the northern outer region. *Id.*, Figs. 2-8. During this suburbanization trend, the inner city and nearby suburbs lost large numbers of white residents as they spread further out into communities along the major arteries extending from downtown. (*Id.*, at 6.) This growth has caused a great deal of traffic congestion and has required the building and expansion of several roads and highways, including the I-485 beltway.

Today, blacks are still more concentrated near the inner city, and whites have become highly concentrated in the outer peripheries. (PX 138 at 8, Fig. 8 (Clark Rpt.).) Nevertheless, there is a greater degree of residential integration in the county than there was thirty years ago. (*Id.* at 8, Table 3). As compared to the nation's major metropolitan areas, Charlotte has become one of the most racially integrated cities in America. (*Id.* Table 4). This is generally due to the dispersion of blacks into the suburbs. (*Id.* at 7- 8.) In fact, some of the middle suburban communities that were almost all white in 1970 are now predominately black. (*Id.*, at 8.)

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[8]The Court defines the "inner city" as the central area of the county, bounded by I-85 to the north, Billy Graham Parkway to the west, and Route 4 to the south and east. (DX 5 Attach. E (Foster Rpt.).) Surrounding the inner city is a doughnut-like "middle suburban" ring, with an approximately fifteen-mile diameter. (*Id.*). The Court refers to the remaining area of the county as the "outer area." (*Id.*)

The county's school system has experienced substantial growth and change as well. Of course, CMS was a large system at the beginning of the *Swann* litigation, as noted by the Supreme Court in 1971:

> The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. The area is large-550 square miles--spanning roughly 22 miles east- west and 36 miles north-south. During the 1968-1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro.

Swann, 402 U.S. at 6, 91 S.Ct. at 1271. Today, CMS has become the twenty- third largest school system in the nation. (Tr. 6/8 at 6 (Test. of Eric Smith).) In the 1998-99 school year, CMS served 98,542 pupils in 135 schools, including 85 elementary schools, 27 middle schools, 14 high schools, and 9 special schools. (DX 3 (CMS Enrollment Rpts.).) The current racial composition of schoolchildren in CMS is approximately 50% white, 42% black, and 8% other. (DX 215 (1998-99 CMS Facts).)

The growth in the school age population was relatively stable until the 1990s, at which time it experienced rapid yearly increases. (PX 138 4-5, Table I (Clark Rpt.).) Since about 1992, CMS has realized *238 3% growth annually, which equates to roughly 3,000 additional students per year. (PX 139 at 3 (CMS Student Assignment Proposal for 1998-99).) While the black student population in CMS has grown steadily since 1970, the white student population declined sharply in the 1970s and continued to decrease in the 1980s before realizing

modest increases in the 1990s. (*Id.*, at 4-5, Fig. 1). Between 1970 and 1990, the number of white students in CMS decreased by more than 15,000. (Id., at 2, Fig. 1.) In the 1990s, CMS has attracted a higher number of white students into the system, but there is still a large proportion who do not attend public schools. (*Id.* 5.) In the 1997-98 school year, the county's private and home school enrollment totaled 15,835. (PX 138 at 5 (Clark Rpt.) (citing statistics of the North Carolina Division of non-Public Education).) This represents a 14.2 percent rate of private school enrollment-almost double the national level. (*Id.*), By comparison, private school enrollment in the 1968-69 school year was only 2,150. (PX 26 (CMS Enrollment with Private School Data).)

When these demographic changes began occurring, CMS responded by modifying student assignments under the desegregation plan. In turn, on a couple occasions, the Court was called on to revisit the issues in *Swann*. First, in *Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F.Supp. 1318 (W.D.N.C.1979), a group of parents brought suit against the school board, seeking an order prohibiting the board from reassigning pupils during the 1978- 79 school year pursuant to a provision in the 1974CAG Plan. The parents relied on the Supreme Court's then-recent decisions in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), to argue that CMS could not assign students based on race.

The Court determined that *Pasadena* and Bakke were inapposite. *Martin*, 475 F.Supp. at 1321. In *Pasadena*, the Supreme Court prohibited a district court from requiring reassignment of students due to racial imbalance that was

caused not by school board action but by demographic changes. 427 U.S. at 424, 96 S.Ct. at 2697. By contrast, in CMS, reassignment was not mandated by the Court but was voluntarily implemented by the board under a board-approved plan. *Martin*, 475 F.Supp. at 1322-23. In *Bakke*, the Supreme Court found unconstitutional a public university's practice of reserving 16 out of 100 admissions slots for racial minorities. 438 U.S. at 319-20, 98 S.Ct. at 2763. By contrast, in the Charlotte-Mecklenburg system, no slots were reserved for students by race; in fact, all students in the system were guaranteed admission into schools of equal quality. *Martin*, 475 F.Supp. at 1321. Hence, the Court found that no students were being denied "opportunities or benefits enjoyed by others solely because of [ ] race." *Id.* (quoting *Bakke*, 438 U.S. at 305, 98 S.Ct. at 2756). The Court further reiterated that although the *Swann* case had been closed, jurisdiction had not yet been relinquished, so remedial race-based measures were still permissible. *Id.* at 1341. The Court observed that the board and its staff were "aggressively attacking the problems" and were committed to integration but jurisdiction was still needed due to lingering effects from past active discrimination. *Id.* at 1341, 1343.

During *Swann's* inactivity, the only other action in this Court affecting the *Swann* case occurred in 1980, when CMS and the *Swann* Plaintiffs notified the Court that the black student population of elementary schools had grown from 29% in 1969 to 40% in 1980, making it increasingly difficult to avoid majority black elementary schools. (PX 113 (Mot. to Modify Orders).) The Court approved a proposed modification that permitted CMS to operate elementary schools with black student populations of "plus 15%" from the district-*239 wide average. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, No.

1974, slip op. at 2 (W.D.N.C. April 17, 1980) (unpublished order). Other than this modification, the *Swann* case lay dormant for almost a quarter of a century without either side petitioning for further relief and without any complaints of noncompliance.

In the meantime, CMS's student assignment process continued to operate under the desegregation plan approved by the Court, which focused primarily on pairing elementary schools, using satellite attendance zones, and operating a feeder plan to assign students from certain neighborhoods to certain secondary schools. (DX 108 at 2 (Stolee Plan).) CMS periodically reassigned students as demographics changed, the population grew, new schools were opened, and old schools were closed. (*Id.* at 3-4.) The greatest change in student assignment policy occurred in 1992, when CMS implemented a modified pupil assignment program that emphasized the use of "magnet" schools.[9] (DX 112 (CMS Student Assignment Plan: A New Generation of Excellence).) This change allowed CMS to phase out pairing, which had become increasingly unstable and unpopular. (DX 108 at 3-6 (Stolee Plan); Tr. 5/3 at 18-20, 22 (Test. of Jeffrey Schiller).) The plan also contemplated the increased use of "stand alone" and

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[9]A magnet school is "a public elementary or secondary school ... that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7204 (1999). The special curricula offered in CMS's magnet program include communication arts, Montessori, advanced math and science, visual and performing arts, classical studies, international baccalaureate, global studies, workplace training, finance, medical sciences, and foreign languages. (PX 43 (CMS Magnet Options 1998-99).)

"mid-point" schools,[10] so that satellite zones could be phased out. (Tr. 5/3 at 21 (Test. of Jeffrey Schiller).)

Dr. Michael Stolee, the consultant who drafted the new assignment plan, recommended that CMS secure approval from the Court before making any changes. (DX 108 at 9 (Stolee Plan).). CMS never sought Court approval, however, and implemented the plan without any direct judicial supervision. CMS claims that it relied on the provision for "optional schools" in the *Swann* Order of July 30, 1974. 379 F.Supp. at 1104. CMS had operated a few open enrollment "optional" schools since 1973; yet, none of these schools offered the distinct curricula of the magnet programs started in the 1990s. (*See* DX 5 Attach. B, Table 5 (Foster Rpt.).) The race-based admissions policies of these new magnet schools became the impetus for the current litigation.

C. *Capacchione v. Charlotte-Mecklenburg Schools/Swann* Reactivated

On September 5, 1997, William Capacchione filed a Complaint against CMS, claiming his daughter, Cristina, was unlawfully and unconstitutionally denied admission into a magnet school program due to a rigid racial enrollment quota. Cristina's racial identity is Hispanic and Caucasian, which CMS classifies as "non-black." The Complaint sought declaratory, injunctive, and compensatory relief under 42 U.S.C. §§ 1983 and 2000d.

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[10]A stand alone school is located in a naturally integrated neighborhood with a contiguous attendance zone. (PX 6 at 5 (Tidwell Rpt.).) A mid-point school draws on students from black and white neighborhoods and is located halfway between such neighborhoods. (*id.*)

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On October 22, 1997, CMS moved for dismissal, asserting that the magnet school's race-based assignment policies were required under the Court's desegregation order in *Swann*. Almost simultaneously, counsel for the original Swann Plaintiffs moved to reactivate *Swann* and to consolidate it with the *Capacchione* litigation. The Swann Plaintiffs, like CMS, contended that past vestiges of the dual school system remained unremedied.

On March 6, 1998, the Court granted the *Swann* Plaintiffs' motions to restore *240 *Swann* to the active docket and to consolidate it with *Capacchione*, finding that the cases involved several common issues of law and fact. The Court denied CMS's motion to dismiss, finding that Capacchione had met his pleading burden and noting that the magnet school assignment plan had never been subject to judicial review.

On March 16, 1998, CMS filed an Answer to Capacchione's Complaint, again asserting that the magnet school program was instituted in an attempt to comply with the Court's orders. Capacchione filed an Amended Complaint, stating that the Court-ordered desegregation plan in *Swann* did not justify the discrimination in question because the school system had long-since achieved unitary status.

The Court permitted Capacchione to intervene in the *Swann* action on May 4,1998. On May 20, 1998, the Court granted another motion to intervene in the consolidated action by Michael P. Grant et al., a group of parents of students in the school system. Similar to Capacchione, these parents sought a finding that the school system had achieved unitary status as required by the Court's orders and urged an end to the school system's race-based policies.

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In August 1998, Capacchione and his family moved to California. In deposition testimony, Capacchione stated that his family had no intent of moving back to Charlotte. (Capacchione Dep. Tr. at 122-23.) In light of these circumstances, on November 12, 1998, the Court granted in part and denied in part a Motion for Summary Judgment filed by CMS. The Court found that Capacchione no longer had standing to assert injunctive or declaratory relief but found that Capacchione still had standing to pursue compensatory relief.

During the trial, Capaechione and Grant et al. consolidated their cases. They are collectively referred to in court documents and exhibits as the "Plaintiff-Intervenors." Following the presentation of the Plaintiff- Intervenors' evidence, CMS and the *Swann* Plaintiffs both filed motions to dismiss the various claims of the Plaintiff-Intervenors. The Court reserved ruling on most of these arguments because they involved factually justiciable issues or they involved issues where an immediate ruling did not reduce significantly the remaining amount of testimony. (Order of 5/28/99 at 1.) With regard to actual damages, however, the Court found that the Plaintiff- Intervenors did not prove actual injury as required for compensation for a constitutional claim. (*Id.*) citing *Price v. City of Charlotte,* 93 F.3d 1241, 1248-57 (4th Cir.1996), *cert. denied,* 520 U.S. 1116, 117 S.Ct. 1246, 137 L.Ed.2d 328 (1997).) Specifically, the Court found: "The Plaintiff-Intervenors only presented conclusory statements that their children suffered emotional distress; none of the Plaintiff-Intervenors ever sought medical or psychological treatment for their children. Moreover, the alleged injuries did not flow from the alleged equal protection violation." (*Id.*) The Court now addresses the remaining issues in this case.

II. DISCUSSION AND ANALYSIS

A. The Constitutional Basis for Race Conscious Desegregation Orders

The Fourteenth Amendment provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In the school desegregation context, the watershed decision of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, stood for the proposition that separate treatment for people of different races violates the Constitution's equal protection guarantee. Justice Harlan recognized this race neutrality principle in his prophetic dissent from the misguided "separate but equal" doctrine enunciated in *Plessy v. Ferguson,* when he stated: "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of *241 those entitled to be protected in the enjoyment of such rights." 163 U.S. 537, 554, 16 S.Ct. 1138, 1145, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

Because of the "odious" nature of racial classifications, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and are reviewed under the strictest judicial scrutiny, regardless of whether the classification is intended to burden or benefit a particular race. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 215-16, 115 S.Ct. 2097, 2107, 132 L.Ed.2d 158 (1995) (quoting *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943); *Korematsu v. United States,* 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944)). Consequently, "[racial] classifications are constitutional only if

they are narrowly tailored measures that further compelling governmental interests." *Id.* at 227, 115 S.Ct. at 2113. Modern Supreme Court precedent suggests that there is only one compelling state interest that will justify race-based classifications: remedying the effects of past racial discrimination. *Metro Broadcasting, Inc. v. Federal Communications Comm'n,* 497 U.S. 547, 612, 110 S.Ct. 2997, 3034, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989); *Hopwood v. State of Texas,* 78 F.3d 932, 944 (5th Cir.1996).

It is in this remedial context that the race-conscious desegregation orders of *Swann* were constitutionally permissible; the District Court's injunction was specifically aimed at dismantling an unconstitutional school system. *Swann,* 402 U.S. at 22, 91 S.Ct. at 1279. While *Swann,* acknowledged the broad scope of courts' equitable authority,[11] it also recognized the limitations and potential abuses that can come about from using race as a remedial device. *Id.* at 24-28, 91 S.Ct. at 1280-82; *see Spangler,* 427 U.S. at 434, 96 S.Ct. at 2704 (" '[1]t must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system." (citing *Swann* 402 U.S. at 28, 91 S.Ct. at 1282)); *Ho v. San Francisco Unified School Dist.,* 147 F.3d 854, 865 (9th Cir.1998) (holding that race-conscious provisions in a desegregation decree had to be narrowly tailored); *see also Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 212 (4th Cir.1993) ("Of all the criteria by which men and

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[11]Of course, even a court's equitable authority is limited in the sense that a court can only order that which is reasonable, feasible, and workable. *Swann,* 402 U.S. at 31, 91 S.Ct. at 1283.

women can be judged, the most pernicious is that of race.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome." (quoting *Maryland Troopers Ass'n. Inc. v. Evans,* 993 F.2d 1072, 1076 (4th Cir.1993))).

For example, the Supreme Court in *Swann* upheld only "the very limited use made of mathematical ratios" in crafting student assignment plans, 402 U.S. at 25, 91 S.Ct. at 1280, and allowed the gerrymandering of school attendance zones only as "an interim corrective measure." *Id.* at 27, 91 S.Ct. at 1282. Most importantly, any race-based remedies had to be specifically focused on remedying the constitutional violation in question and could not expand beyond that purpose. *Id.* at 22-23, 91 S.Ct. at 1279. Stated the Supreme Court:

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be ***242** retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

Id.; see also Milliken v. Bradley, 433 U.S. 267, 282, 97 S.Ct. 2749, 2758, 53 L.Ed.2d 745 (1977) ("*Milliken II* ") ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.").

The temporal scope of desegregation orders is also limited in that such decrees "are not intended to operate in perpetuity." *Board of Educ. v. Dowell,* 498 U.S. 237, 248, 111 S.Ct. 630, 637, 112 L.Ed.2d 715 (1991). "From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Id.* at 247, 111 S.Ct. at 637.

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'

Id., at 248, 111 S.Ct. at 637 (quoting *Spangler v. Pasadena City Bd., of Educ.,* 611 F.2d 1239, 1245 n. 5 (9th Cir.1979) (Kennedy, J., concurring) (citing *Milliken II,* 433 U.S. at 280-82, 97 S.Ct. at 2757-58)); *see also Freeman v. Pitts,* 503 U.S. 467, 505, 112 S.Ct. 1430, 1453, 118 L.Ed.2d 108 (1992) (Scalia, J., concurring) ("But we also envisioned [federal supervision of local school systems] as temporary, I think,

because the rational basis for the extraordinary presumption of causation simply must dissipate as the *de jure* system and the school boards who produced it recede further into the past."). Thus, a desegregation order does not condemn a school board to "judicial tutelage for the indefinite future," as "[n]either the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result." *Dowell,* 498 U.S. at 249, 111 S.Ct. at 638.

In addition to remedying a constitutional violation, the end purpose of a desegregation order is "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Freeman,* 503 U.S. at 489, 112 S.Ct. at 1445. As the law of school desegregation has developed, that withdrawal of jurisdiction occurs when the district court finds that the school system has achieved unitary status. *Id.; Dowell,* 498 U.S. at 248, 111 S.Ct. at 637; *Swann,* 402 U.S. at 32, 91 S.Ct. at 1284.

B. Unitary Status

The term "unitary status" has no fixed meaning. *Freeman,* 503 U.S. at 486-87, 112 S.Ct. at 1443-44. In fact, the terms "unitary" and "dual" are nowhere found in the Constitution; they are simply descriptive words that identify school systems that are either in or out of compliance with the commands of the Equal Protection Clause. *Id.* at 486-87, 112 S.Ct. at 1443- 44 (citing *Dowell,* 498 U.S. at 245-46, 111 S.Ct. at 636). The concept of achieving unitary status was established in *Green,* where the Supreme Court stated that the goal of equitable relief in a desegregation case was "to convert [a dual system] to a unitary system in which racial

discrimination would be eliminated root and branch." 391 U.S. at 437-38, 88 S.Ct. at 1694.

***243** Since *Green,* the use of the term "unitary" has been inconsistent. *Dowell,* 498 U.S. at 245, 111 S.Ct. at 635. Sometimes the term is used to describe a school system that has been released from supervision after fully remedying all vestiges of past discrimination. *Id.* (citing *United States v. Overton,* 834 F.2d 1171, 1175 (5th Cir.1987); *Riddick v. School Bd.,* 784 F.2d 521, 533-34 (4th Cir.1986); *Vaughns v. Board of Educ.,* 758 F.2d 983, 988 (4th Cir.1985)). The term also has been used to describe a school system that has implemented a desegregation plan but has not yet eliminated the vestiges of past discrimination. *Id.* (citing *Georgia State Conference Branches of NAACP v. Georgia,* 775 F.2d 1403, 1413 n. 12 (11th Cir.1985)); *see also United States v. Georgia,* 171 F.3d 1344, 1347 (11th Cir.1999). In the latter circumstance, courts draw a distinction between a school system that is "unitary" and one that has achieved "unitary status." *Dowell,* 498 U.S. at 245, 111 S.Ct. at 635-36. In other words, a school system that has achieved unitary status is one that "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures," i.e., a unitary status hearing or a consent order. *Id.* at 245, 111 S.Ct. at 636 (quoting *Georgia State Conference,* 775 F.2d at 1413 n. 12).

With regard to *Swann,* Judge McMillan closed the case in 1975 after the school system had adopted a desegregation plan that he previously declared would produce a "unitary" school system. *Swann,* 67 F.R.D. at 649; *see Swann,* 379 F.Supp. at 1103. This did not constitute a finding that CMS had achieved unitary status or that the orders had been

terminated or dissolved. To the contrary, Judge McMillan stated that the orders in this case remained in continuing effect, *Swann*, 67 F.R.D. at 649; *Martin*, 475 F.Supp. at 1341, and CMS has continued to operate under the assumption that it was still subject to federal court supervision. Thus, it may be said that CMS has been operating a unitary system since at least 1975 but has not yet been granted unitary status. *See Georgia*, 171 F.3d at 1347.

The appropriate analysis for determining whether CMS, at long last, has achieved unitary status is (1) whether the school board has eliminated the vestiges of past discrimination to the extent practicable and (2) whether the school board has in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan, such that it is unlikely for the board to return to its former ways. *Freeman*, 503 U.S. at 492, 112 S.Ct. at 1446; *Dowell*, 498 U.S. at 249-50, 111 S. Ct. at 638. In determining whether a school board has eliminated the vestiges of *de jure* segregation as far as practicable, a district court must carefully assess what the school system has accomplished with respect to the six "*Green* factors"-- student assignment, faculty, staff, transportation, extra-curricular activities, and facilities. 391 U.S. at 435, 88 S.Ct. at 1693. In its discretion, a court may consider any other ancillary factors. *Freeman*, 503 U.S. at 492, 112 S.Ct. at 1446.

A district court may withdraw all judicial supervision over a school system if it finds that the system has achieved unitary status in all respects, or it may withdraw supervision incrementally with respect to discrete categories when the system has achieved only partial compliance with a desegregation plan. *Id.* at 471, 112 S.Ct. at 1436. In the present case, the Plaintiff-Intervenors assert that the system has

achieved unitary status in all respects. CMS and the Swann Plaintiffs contend that the school system has not achieved unitary status as to any of the *Green* factors and further assert that CMS has discriminated in areas such as teacher quality, academic achievement, and discipline.

The burden of proof for showing whether CMS is free of the vestiges of segregation falls on the parties seeking to end court supervision: the Plaintiff-Intervenors. ***244** *Id.*, at 494, 112 S.Ct. at 1447. Evidentiary considerations inevitably will impact this burden. Given that school boards are "entitled to a rather precise- statement of [their] obligations under a desegregation decree," *Dowell*, 498 U.S. at 246, 111 S.Ct. at 636, the lack of any prior remedial orders or findings of discrimination in certain areas of school operations tends to allay the Plaintiff-Intervenors' burden of proof as to those areas. *Keyes v. School Dist. No. 1*, 902 F.Supp. 1274, 1282 (D.Colo.1995). The passage of time is likewise an evidentiary consideration that affects the burden of proof. *Freeman*, 503 U.S. at 491-92, 496, 112 S.Ct. at 1446, 1448; *id.*, at 503, 112 S.Ct. at 1452 (Scalls, J., concurring); *Jenkins v. Missouri*, 122 F.3d 588, 595 (8th Cir.1997). As to any facets of school operations where the Courtexpressly found that the school system was free of discrimination, such findings become the law of the case and shift the burden back to the parties trying to prolong judicial oversight: CMS and the Swann Plaintiffs. *Riddick*, 784 F.2d at 531; *Jacksonville Branch, NAACP v. Duval County School Bd.*, No. 85-316-Civ-J-10C, slip op. at 139 (M.D.Fla. May 27, 1999). Underlying this burden-shifting scheme is a district court's ultimate duty to return control of school operations to local authorities when judicial supervision is no longer necessary. *Missouri v. Jenkins*, 515 U.S. 70, 99,

115 S.Ct. 2038, 2054, 132 L.Ed.2d 63 (1995) ("*Jenkins III*"); *Freeman*, 503 U.S. at 489-90, 112 S.Ct. at 1445.

1. Student Assignment

Like most desegregation cases, the orders entered during the active phase of *Swann*, from 1969 to 1975, focused primarily on erasing discrimination in student assignment, which was the hallmark of a segregated school system. *See Swann*, 402 U.S. at 18, 91 S. Ct. at 1277 ("[T]he several related cases before us are primarily concerned with problems of student assignment."); *id.* at 22, 91 S. Ct. at 1279 ("The central issue in this case is that of student assignment."). Accordingly, the "critical beginning point" and "fundamental" inquiry of a unitary status determination is the degree of racial imbalance in student assignment. *Freeman*, 503 U.S. at 474, 112 S. Ct. at 1437.

a. The Standard for Compliance

During the trial, there was disagreement about what the *Swann* orders required for numerical compliance. Given that Judge McMillan entered roughly fifteen orders addressing student assignment, it is not surprising that the applicable standard is somewhat hazy. Then again, the standard should be somewhat hazy. A court must constantly anchor itself in the constitutional violation and must not get caught up in bean-counting. *Swann*, 402 U.S. at 22-24, 91 S. Ct. at 1279-80. The Court's student assignment guidelines, which do not anticipate a simple quantitative analysis, are as follows: (1) "[t]hat no school be operated with an all-black or

predominately black student body"[12] (2) "[t]hat pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students," and (3) that CMS "prevent any school from becoming racially identifiable." *Swann,* 311 F.Supp. at 268.

The first guideline addressed the concern that CMS's slowest progress in dismantling the dual system was the desegregation of formerly-*de jure* black schools. Fifteen years after *Brown I,* a large number ***245** of these schools were still 99% to 100% black. *Swann,* 300 F.Supp. at 1368. While the Court did not define precisely what a "predominately black student body" was, the guideline has been interpreted to mean that no school should be operated with a majority black student body, i.e., one that is over 50% black.[13] (*See, e.g.,* PX 93 at CM095416 (CMS Student Assignment Proposals 1996-97); PX 113 at 2 (Joint Mot. to Modify Orders filed 4/16/80).)

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[12]Of course, an all-black or predominately black school is not per se unconstitutional, *Swann,* 402 U.S. at 25-26, 91 S.Ct. at 1280-81, and it would be insidious to assume that a school which is all or predominately black is inherently inferior. To the contrary, "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Jenkins,* 515 U.S. at 122, 115 S.Ct. at 2065 (Thomas, J., concurring). The purpose of this guideline, rather, was to rid the system of its most conspicuous vestige of segregation.

[13]One finding that seems to contradict this interpretation is Judge McMillan's observation, in 1969, that Elizabeth Elementary, which was 58% black at the time, had "a substantial degree of apparently stabilized desegregation." *Id.,* at 1367-68.

The second guideline requires the racial composition of each school to reflect the district-wide average. In 1970, when this guideline was mandated, the district's racial composition was 29% black and 71% non-black. While the Court acknowledged that "variations from that norm may be unavoidable," *Swann*, 311 F.Supp. at 268, it did not suggest how much variance from the norm-s a plus-or-minus percentage-would be tolerable. The only specific variance ever approved by the Court is found in the one-page unpublished order from 1980, which allowed elementary schools to operate with black student populations of "plus 15%" from the district-wide average. *Swann*, No. 1974, slip op. at 1 (April 17, 1980). This upward variance acknowledged that it was no longer practicable to avoid majority black elementary schools given the increasing black enrollment. (PX 113 at 2 (Joint Mot. to Modify Orders).) At the time, the black student ratio in elementary schools had risen to 40%, which meant that an elementary school could have a 55% black student population. *Id.* The modification applied only to elementary schools because secondary schools had low enough black student populations that they could operate at roughly 15% above the system-wide ratio and still avoid being majority black. (DX 3 (CMS Enrollment Rpts.)) high schools were 35% black in 1980; middle schools were 37% black). Last year, on the other hand, the black student ratio was 42% in middle schools and 40% in high schools, (id., which provided breathing room of only 8% and 10% as an upper limit). Given that +10% was too constricting a ceiling for elementary schools in 1980, it would make little sense to impose an even more constricting ceiling of +8% for middle schools today. It is also worth noting that the Court, in 1970, allowed CMS an upper limit of 21% above the district-wide black average based on the "no

majority black schools" interpretation. So, even a +15% upper limit is a relatively strict standard.

The third guideline, prohibiting racially identifiable schools, seems to target the more extreme cases of racial isolation. *Accord Jacksonville Branch. NAACP v. Duval County School Bd.*, No. 85-316-Civ.-J-10C, slip op. at 10-11 (M.D.Fla. May 27, 1999) (defining "identifiably black" as those schools with a black student population in excess of 75% and "identifiably white" as those schools with a black student enrollment of 15% or less). For example, it would be difficult to say that a school with a 51% black student body was racially identifiable, even though, under the no majority black schools interpretation, it might be viewed as such. Determining what is identifiably white is even more difficult. Early on, the Court classified "schools readily identifiable as white" as schools with white percentages above 85%. *See Swann*, 311 F.Supp. at 270; *Swann*, 306 F.Supp. at 1303. Yet, the Court acknowledged that Highland Elementary, which was only 13% black, had achieved adequate desegregation. *Swann*, 300 F.Supp. at 1367-68. Also, the 1970 court-mandated plan-which, the Court said, "achieves full desegregation" allowed black student percentages as low as 3% (Bain Elementary), 9% (Matthews Elementary), 12% (Newell Elementary), and 14% (Clear Creek Elementary). *Swann*, 311 F.Supp. at 270, Ex. J. The Court, therefore, was willing to accep a number ***246** of schools with large white majorities as part of a desegregated system.

In sum, the measuring stick for compliance in student assignment is not a model of clarity. The parties agree that the orders allow elementary schools to operate with black student bodies up to 15% above the district-wide black ratio and allow secondary schools to operate with black student bodies up to

50%. The Plaintiff-Intervenors only challenge the continuing validity of these upper limits. The parties disagree as to whether there is a lower limit for black student populations. CMS and the *Swann* Plaintiffs assert that common practice dictates a minimum black student body in all schools of at least "minus 15%" from the district-wide black ratio. The Plaintiff-Intervenors disagree with this "minus 15%" standard on the grounds that it appears nowhere in the prior orders.[14]

The Plaintiff-Intervenors are technically correct. As to the lower limit, the Court never adopted a "minus 15%" standard or any such downward variance. Nevertheless, Judge McMillan expressed concern about the presence of all-white schools, *Swann,* 311 F.Supp. at 270, so the Court should not ignore completely those schools with small black student populations. *But see Jacksonville NAACP, supra,* slip op. at 11 n. 10 ("The counting of [identifiably white] schools as segregated can tend to distort one's view of the school system as a whole in terms of deciding whether black children continue to be educated in a segregated environment."). As to the upper limit, the differing standards for elementary and secondary schools have become clumsy and obsolete. Given the rise in the black student population, the requirement that no secondary school operate with a majority black student population allows too little breathing room. The variance should be the same for both elementary and secondary schools to allow uniform

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[14]CMS recently acknowledged this aspect of the *Swann* orders, stating that "only an upper limit for Black enrollment was set, with no reference to a lower limit." (PX 93 at CM095416 (CMS Student Assignment Proposals 1996-97).) Regardless, "whenever possible the Board also used a lower limit of 15% below the K-6 Black enrollment." (*Id.*) Thus, CMS used a lower limit only as a self-imposed "aspirational" goal.

flexibility. Indeed, the purpose and result of the 1980 modification, at that time, was to create uniform flexibility.

A singular standard will provide a more accurate evaluation of the system than will the mishmash of standards gleaned from several orders. The only specific variance ever approved by the Court was a "plus 15%" deviation, so the Court will use a +-15% standard. Unless otherwise noted, the Court will refer to racial "balance" and "imbalance" based on this variance. Admittedly, this standard differs somewhat from the explicit standards set by the Court and is more restrictive than necessary.[15] The Court emphasizes, however, that there is no level of compliance with the standard that is determinative; the standard is simply a helpful framework for examining the degree of ideal racial balance in the system. Schools that are substantially outside of the variance will need reasonable and supportable explanations for the imbalance. *Manning v. School Bd.*, 28 F.Supp. 2d 1353, 1357-58 (M.D.Fla.1998) (citing *Swann*, 402 U.S. at 26, 91 S.Ct. at 1281).

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[15]*See, e.g., Reed v. Rhodes*, 1 F.Supp. 2d 705, 716 (N.D.Ohio 1998) (stating that "the common standard used throughout the United States" is "+/-20 percentage points of the percentage of black students enrolled in the District"); *Stell v. Board of Public Educ.*, 724 F.Supp. 1384, 1401 (S.D.Ga.1988) (applying a +-20% standard and observing that several other courts apply the same standard). Based on several of Judge McMillan's findings, it could be argued that the acceptable variance from the district-wide average is as high as +-25% to +-30%. After all, the Court approved of Bain when it was 26% below the district-wide average and commended Elizabeth when it was 29% above the district-wide average.

b. The Level of CMS's Compliance

The parties' expert witnesses testified about the degree of compliance with different ***247** conclusions based on how they manipulated the data and on what standard they applied. Some experts overstated the level of noncompliance by counting schools that are not within the scope of the Court's orders. Witnesses for CMS and the Swann Plaintiffs sometimes labeled Hidden Valley as out of compliance, even though it is an exempt school. (*See e.g.,* Tr. 6/10 at 113-16 (Test. of Dr. Gordon Foster); DX 6 Attach. C, Exs. 1b, 1d (Peterkin Rpt.).) Dr. Robert Peterkin, a CMS expert, inflated the number of "racially identifiable" schools by including several "special" schools, such as schools for the mentally and physically disabled, management schools for students with disciplinary problems, and schools for pregnant teenagers. (DX 6 Attach. C, Exs. 1a-1f (Peterkin Rpt.); DX 7 at 4, Ex. A-138-52 (Peterkin Rebuttal Rpt.); Tr. 6/18 at 48-52 (Test. of Dr. Robert Peterkin).) These schools are not properly included because students do not attend such schools under normal student assignment policies. In addition, Dr. Peterkin and Dr. Leonard Stevens, an expert for the *Swann* Plaintiffs, improperly characterized certain racially balanced schools as racially identifiable on the grounds that in-school assignment and placement practices segregated black students in classrooms. (DX 7 at 6 (Peterkin Rebuttal Rpt.); SX 2 at 22 (Stevens Rpt.).) Specifically, they attacked the practice of ability tracking, which tends to result in predominately black and predominately white classrooms. As discussed further below, no credible evidence was offered to show that CMS has tacked children in a discriminatory manner. *See infra* part II.B.7.b.ii.

Ultimately, the Court must look to the CMS enrollment data to determine the degree of compliance over time. It would be wrong to focus only on a few select years. Dr. Peterkin, for example, emphasized the two most recent school years, (DX 6 at 3 (Peterkin Rpt.), Dr. Stevens only looked at compliance during the 1990s, (SX 2 at 2 (Stevens Rpt.)), and Dr. Gordon Foster, a CMS expert, only looked at nine out of the last twenty years. (DX 5 at 4 (Foster Rpt.).) This is too narrow a lense to examine CMS's compliance. The potential for misleading interpretations was well-illustrated during the cross- examination of Dr. Foster. When asked what was more important in determining unitary status, the fact that a school had been in compliance for twenty-eight years or has been out of compliance for one year by two-tenths of a percentage point, Dr. Foster refused to say which one. (Tr. 6/10 at 81-82 (Test. of Dr. Gordon Foster).) This is simply unreasonable.

It is expected that some schools will exceed a given variance due to student mobility, inaccurate enrollment projections, and other factors beyond CMS's control. *See Estes v. Metropolitan Branches of the Dallas NAACP,* 444 U.S. 437, 448, 100 S.Ct. 716, 722, 62 L.Ed.2d 626 (Powell, J., dissenting from denial of certiorari) ("[P]erfect solutions may be unattainable in the context of the demographic, geographic, and sociological complexities of modem urban communities."); *Swann,* 402 U.S. at 31, 91 S. Ct. at 1283 ("Communities in our mobile society do not, however, remain demographically stable."). If, over the course of three decades, a school has had a racially balanced student body for 90% of the time or greater, it is certainly reasonable to conclude that CMS has complied fully and satisfactorily with the Court's orders as to that school. On the other hand, the continued existence of schools that are substantially racially imbalanced, especially when those

schools are in areas of mixed population, requires close scrutiny. *Swann*, 402 U.S. at 25-26, 91 S. Ct. at 1281. It must be shown that assignments to such schools are genuinely non-discriminatory. *Id.* at 26, 91 S. Ct. at 1281.

The available student enrollment data reveal that CMS has maintained a high ***248** level of desegregation since 1970.[16] Of the 126 elementary, middle, and high schools currently operating, only twenty schools[17] (16%) have had black student bodies higher than 15% above the district-wide ratio for more than three years, and only seventeen schools[18] (13%) have had black student bodies lower than 15% below the district-wide

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[16]CMS provided complete student enrollment data by race, by grade, and by school from the 1978-79 school year to the beginning of the 1998-99 school year. (DX 3 (CMS Enrollment Rpts.).) Between 1970 and 1978, student enrollment data is incomplete. CMS provided data only for the 1972-73 and 1974-75 school years. (PX 137 at 2, 4 (Armor Rpt.).) Using these data along with HEW-OCR enrollment data for 1970, Dr. Armor extrapolated the numbers to estimate enrollments for the missing years. (*Id.*, at 2, 4.) The Court accepts this unrebutted method as reasonable and as the best means available for getting the full picture.

[17]*Elementary Schools:* Ashley Park, Briarwood, Derira, Devonshire, Druid Hills, Highland, Oaklawn, Sedgefield, Shamrock Gardens, Thomasboro, and Westerly Hills. *Middle Schools*: Cochrane, Eastway, J.T. Williams, Spaugh, and Wilson. *High Schools:* Garinger, Harding, Northwest, and West Charlotte.

[18]*Elementary Schools:* Bain, Clear Creek, Cornelius, Davidson Road, Huntersville, Lebanon Road, Long Creek, Mallard Creek, Matthews, McAlpine, and McKee. *Middle Schools*: Alexander, Davidson IB, Randolph, and South Charlotte. *High Schools:* East Mecklenburg and Providence.

ratio for more than three years.[19] In other words, relatively few schools in the system have long histories of racial imbalance.[20] What is more, a great deal of the imbalance has involved borderline discrepancies of a few percentage points. In schools with relatively small student bodies, the displacement of only three or four black students would have put the school back into balance. (*See* Tr. 5/17 at 161-62 (Test, of Dr. Stephen Smith).)

Since 1970, an overwhelming majority of schools--generally, 70% to 100%--have been racially balanced in any given school year. (*See,* PX 137 Figs. 1-2 (Armor Rpt.); DX 6 Ex. 1e (Peterkin Rpt.).) During this time, CMS has operated no all-black or all-white schools. (*See DX* 7 at Ex. A (Peterkin Rebuttal Rpt.).) Aside from Hidden Valley, which is exempted, no school's black population has ever risen above 85%. (*Id.*) Only seven schools have ever had black populations in excess of 75%, and this did not occur until 1994. (*Id.*) In fact, no school ever had a black population exceeding 60% until 1988. (*Id.*)

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[19]Moreover, using the common +-20% standard, only nine schools (7%) exceed the standard for more than three years, and only fourteen schools (11%) fall below the standard for more than three years. Using the explicit Court standards--i.e., the upper limits of 50% black for secondary schools and +15% from the district-wide ratio for elementary schools--only twenty-one of the district's current schools (17%) are out of compliance for more than three years since 1970.

[20]Of course, this cannot be interpreted to mean that all of the remaining schools have been balanced for twenty-six years or more because many schools were built during the last two decades.

The remarkable level of desegregation shown by CMS's enrollment data is further confirmed using the two summary indices of desegregation that are used in the field of desegregation research: the index of dissimilarity, which measures the degree of racial imbalance, and the index of interracial exposure, which measures "the average percent white in schools attended by black students, weighted by the proportion of black students in each school." (PX 137 at 6 (Armor Rpt.).) Dr. David Armor, an expert for the Plaintiff-Intervenors, analyzed CMS with these standard measures. The results show that CMS was "severely imbalanced" prior to 1970, then "highly desegregated" for about twenty years, and "well desegregated" for the remaining years. (*Id.* at 6-7, Charts 4-5.) Based on these indices, when CMS is compared to other school districts of similar size and racial composition, CMS has achieved a higher degree of racial balance than several other districts that ***249** have been declared unitary. (*Id.* at 7, Table 1.)

c. Desegregation and Demographic Trends

Focusing, next, on when, where, and how the racial balance and imbalance has occurred, the Court starts with the fact that, under the dual system, schools were either all black or all white. By 1969, two-thirds of black students in the city of Charlotte--approximately 14,000 of them--still attended schools that were either all black or more than 99% black. *Swann,* 402 U.S. at 6-7, 91 S. Ct. at 1271. This statistic changed dramatically once the Court mandated a desegregation plan. In 1970, only four schools had majority black student populations: Barringer Elementary, Berryhill Elementary,

Amay James Elementary, and Wilmore Elementary.[21] (PX 137 at 4 (Armor Rpt.).) Between 1972 and 1978, available data show only two schools besides Hidden Valley with majority black student populations: Wilmore, which was 51% in 1974, and Spaugh Middle, which was 51% in 1978. (*Id.*) In 1979, only three schools were above 50% black: Devonshire Elementary, Smith Elementary, and Cochrane Middle, each of which were 52% black. (*Id.*) After the "plus 15%" rule came into play in 1980, only Briarwood Elementary, which was 56% black, exceeded the new standard. (*Id.*) In sum, during the first decade of the desegregation plan, almost every school complied with the Court's orders, and the few schools that exceeded the Court's standards did so by just one or two percent. (*Id.*)

CMS remained in substantial compliance throughout the 1980s. (*Id.*) Although more schools fell out of balance during this period due to demographic changes, only a few schools were consistently out of balance. (*Id.;* PX 138 at 9-13 (Clark Rpt.).) By this time, the school board had "institutionalized" the Court's racial balance guidelines such that the board was constantly adjusting boundaries, adding satellite zones, and reassigning students to different schools. (Tr 4/22 at 5-10 (Test. of Sharon Bynum).) This was a difficult process not just for the board members and school staff but for the families who were required to send their children to different schools every couple of years. (*Id.*)

In the 1990s, CMS--faced with a growing number of imbalanced schools and parents' concerns about stability and proximity of school assignments--made a major change to its

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[21]Wilmore was closed in 1977. (PX 158 at CM035831 (Schools Closings List).)

student assignment policies with its magnet school initiative. *See supra* part I.B. This change eliminated some of the longest mandatory bus rides and promoted a more voluntary system of desegregation. (Tr. 4/26 at 25-27 (Test. of John Murphy).) The implementation of magnet schools also helped to restore and maintain racial balance in schools that were rapidly becoming imbalanced. (PX 69 at CM098438 (Mem. of CMS Assistant Superintendent); Tr. 4/26 at 41-43 (Test. of John Murphy); Tr. 6/8 at 86-87 (Test. of Eric Smith).) In particular, Ashley Park, J.T. Williams, Spaugh, Harding, and Northwest each had trends of about four to six years of black enrollment above the Court's standards in the late 1980s. (DX 3 (CMS Enrollment Rpts.).) After these schools implemented magnet programs, racial balance improved immediately by as much as 30%,[22] and each of these schools has remained racially balanced for the last six or seven years. (DX 3 (CMS Enrollment Rpts.).) At the same time, however, if enough students left their assignment zones for magnets, it would affect the balance of the schools to which they were otherwise assigned.[23] (Tr. 6/9 at 88-90 ***250** (Test. of

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[22]For example, Spaugh went from 72% black in 1991-92 to 42% black in 1992-93, (*id.*), which was the year it implemented a math, science, and technology magnet program. (DX 5 Attach. B, Table 5 at 4 (Foster Rpt.).)

[23]In contrast to Judge McMillan's warning about potential re. segregation from "optional schools" that did not have adequate safeguards, such as transportation and notification, the effects seen here have not wreaked "havoc" on or resulted in "significant jeopardy" to the underlying desegregation plan. *Swann*, 379 F.Supp. at 1103-04. To the contrary, magnet schools have had an overall effect of countering resegregntive trends, and a higher percentage of black students would have attended predominately black schools had the magnet schools not existed. (PX 1 at 10 (CMS Staff Discussion Paper); PX 6 at 9, 22 Fig. 1 (Tidwell Rpt.).) Furthermore, Dr. Foster testified that CMS "kept an eye on [magnet

Dr. Gordon Foster).) In addition, the large influx of new students in the system, the changing demographics of the county, and the expanding geographic distribution of school-age children continued to affect the racial balance of assignment zones. (See PX 137 at 5-6 (Armor Rpt.); PX 138 at 2- 13, Figs. 1-8 (Clark Rpt.).)

CMS and the Swann Plaintiffs assert that because there is more residential integration in the county than there was thirty years ago, see *supra* part I.B, it should be easier to racially balance more schools. This is an overly simplistic assumption. The beginning stages of desegregation involved a very high level of artificial school integration. Not surprisingly, this is difficult to maintain over time. Furthermore, the gradual increase in residential integration did not occur in a finite setting. The population in Mecklenburg county nearly doubled in the last three decades. *See supra* part I.B. At the same time, the population has expanded geographically into areas that were completely undeveloped at the time of the dual system. *See supra* part I.B. The fact that there are more pockets of integration has made it easier to have more stand alone schools in naturally integrated areas, but, looking at the system as a whole, there are still stark demographic contrasts between the inner city and the southernmost and northernmost areas of the county.

This argument is also premised on an erroneous legal assumption: that racial balance is to be pursued wherever and whenever it is possible.

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transfers] so that there wouldn't be a run on the bank so to speak from any one school." (Tr. 6/9 at 88-89 (Test. of Dr. Gordon Foster).) The problem, in his view, is that CMS did not have rigid controls in place. (*Id.*, at 89.)

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.

Freeman, 503 U.S. at 494, 112 S. Ct. at 1447; *see Swann*, 402 U.S. at 24, 91 S. Ct. at 1280 ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."). There can be no doubt that demography and geography have played the largest role in causing imbalance. There has been no showing that CMS has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools. In fact, the opposite is true; CMS has openly encouraged and endorsed policy initiatives that promote integrated communities. *See infra* part II.B.8.

d. The Concerns of *Martin:* School Siting and Transportation Burdens

CMS and the Swann Plaintiffs also argue that the system cannot be declared unitary because there has been more imbalance in recent years than at any time since the desegregation orders have been in place. They point to the fact that, in the 1979 *Martin* decision, Judge McMillan observed that " '[r]acially neutral attendance patterns' ha[d] never been achieved," even though, at that time, there were only a few schools with majority black populations. 475 F.Supp. at 1340. It is important to look at the *Martin* case in context. *Martin* was not a unitary status hearing; it was an action by parents to

prevent CMS's reassignment of students three ***251** years after *Swann* was closed. Given that the desegregation plan was still in its fledgling stages, the Court was inclined to keep the pressure on CMS. *Id.* Thus, the Court stated that continued supervision of student assignment was needed due to ongoing concerns related to the siting of schools and the disproportionate transportation burdens on black children.[24] *Id.* at 1341. Twenty years after *Martin,* the Court must look at those student assignment concerns in a new light. "[W]ith the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision." *Freeman,* 503 U.S. at 491-92, 112 S.Ct. at 1446.

With regard to school siting concerns, the Supreme Court stated that "it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system." *Swann,* 402 U.S. at 21, 91 S.Ct. at 1279. The Supreme Court recognized that, after *Brown,* school authorities opposed to integration had closed schools in racially mixed areas and simultaneously built new schools in the outer suburban areas, far away from black populations. *Id.* at 21, 91 S.Ct. at 1278. Such policies, "when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races." *Id.* District courts, therefore, must ascertain whether there is a discriminatory pattern in school siting practices. *Id.* at 21, 91 S.Ct. at 1278-79. In

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[24]These concerns did not modify any of the outstanding *Swann* orders. In fact, *Swann* remained inactive during the *Martin* case. Also, the Court did not impose any new injunctive orders against CMS.

accordance with this admonition, the 1974 CAG Plan, approved by Judge McMillan, contained the following provision: "School planning is not to be predicated on population growth trends alone; consideration is to be given to the influence new building can be toward simplification of an integrated pupil assignment plan. Buildings are to be built where they can readily serve both races." *Swann*, 379 F.Supp. at 1107.

The evidence shows that the school siting decisions of CMS have not constituted an intentional or neglectful pattern of discrimination. Even though CMS has been forced to deal with an extraordinary amount of growth in the system, it has not based its school planning on growth trends alone. The school board and its staff routinely consider racial diversity in school siting decisions. (Tr. 4/27 at 9-11, 15-16, 152-53 (Test. of Jonathan Wells); Tr. 4/21 at 13 (Test. of Lindalyn Kakadelis).) They also consider a host of other important criteria, such as the system's finances, land values, site availability, zoning laws, topography, site size, building capacity, adequacy of public utilities, utilization of adjacent or feeder schools, traffic patterns, and the time and distance to transport students. (See Tr. 4/27 at 9 (Test. of Jonathan Wells); Tr. 5/25 at 5-7 (Test. of William Booker); Tr. 4/22 at 33-36, 72-73 (Test. of Sharon Bynum); Tr. 4/21 at 12 (Test. of Lindalyn Kakadelis).)

In 1992, CMS voluntarily resolved to build schools only in areas where blacks constituted at least 10% of the population. (PX 23 (CMS Resolution adopted 2/11/92).) Given that, in 1990, almost half of the county was comprised of census tracts that were less than 10% black, (DX 12 Fig. 17 (Lord Rpt.)), sustained adherence to this goal was improbable.

In 1994, Assistant Superintendent Jeffrey Schiller found that, under the so-called "10% rule," it would be impossible for CMS to populate all schools with a 60% non-black-40% black ratio and still meet a 60-minute bus ride limit. (SX 122 at 5 (CMS Board Minutes of 4/26/94).) Despite these obstacles, the board still was mindful of its racial balancing goals and, at one point, even debated whether to accept a donation of free land for school use because it was located in the predominately ***252** white, southern area of the county.[25] (SX 119 at 4-5 (CMS Board Minutes of 5/28/96); Tr. 4/22 at 15-16 (Test. of Lindalyn Kakadelis).)

Since 1980, CMS has built twenty-seven new schools, completely renovated and "reopened" several old schools, and transformed some administration buildings into schools. (DX 266 (CMS School Construction 1980 to Present); PX 186 (CMS Physical Facilities Buildings and Additions); PX 187 (CMS Mem. re: Schools Opened and Renovated/Reopened); Tr. 4/26 at 61-63 (Test. of John Murphy).) With the exception of some of the newest schools in the southernmost and northernmost areas of the county, these schools have been able to accommodate racially balanced student populations.

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[25]The board ultimately accepted the gift by a vote of five to four. (SX 119 at 5 (CMS Board Minutes of 5/28/96).) The donated land is located in the Ballentine development in the southernmost part of the county, which is the region experiencing some of the most intense growth. (PX 138 at 6, Fig. 4 (Clark Rpt.).) Thousands of residential building permits had been issued in this area years before this land was donated. (PX 3 at CM073068 (CMS Board Minutes of 1/12/88).) The nearest schools are already seriously overcrowded; McKee Elementary, for example, had to use twenty-four mobile classrooms last year. (DX 4 (CMS Capacity and Utilization Rpts. 1990-91 to 1998-99); Tr. 4/21 at 11-12 (Test. of Lindalyn Kakadelis).)

(*Compare DX* 266 (CMS School Construction 1980 to Present) *with DX* 3 (CMS Enrollment Rpts.).)[26]

If CMS was engaged in a pattern of closing its racially mixed suburban schools and simultaneously building schools in the county's outer areas, it could be seen as an attempt to "lock the school system into the mold of separation of the races." *Swann* 402 U.S. at 21, 91 S.Ct. at 1278. That has not been the case here. CMS has not closed its racially balanced schools in the middle suburban area. Quite the contrary, schools in the middle suburban areas have maintained a high degree of racial balance, and the number of stand alone schools in naturally integrated areas continues to increase. (Tr. 6/22 at 27 (Test. of Arthur Griffin).) As of the 1998-99 school year, twenty-two stand alone schools have been created. (*Id.*)

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[26]The majority of new schools built since 1980-fifteen out of twenty-seven-have had racially balanced student bodies every year since they have been open. (DX 3 (CMS Enrollment Rpts.).) Only two schools built since 1980--Morehead Elementary (one year old) and Winding Springs Elementary (four years old)--have even had black student bodies above +15% from the district-wide average, though only by one to three percentage points. (*Id.*) Six new schools--Crown Point Elementary (six years old), Lebanon Road Elementary (nine years old), Mallard Creek Elementary (twelve years old), McAlpine Elementary (thirteen years old), McKee Elementary (ten years old), and Providence High (ten years old)--have gone in and out of balance since opening. (*Id.*) Only four new schools--Elizabeth Lane Elementary (three years old), Crestdale Middle (one year old), Davidson IB Middle (five years old), and South Charlotte Middle (seven years old)--have never had black populations above -15% from the district-wide average. (*Id.*) Of these four schools, the black population was 16% during Crestdale's first year and has ranged from 2-4% at Elizabeth Lane, 24-26% at Davidson IB, and 12-19% at South Charlotte. (*Id.*)

Meanwhile, the siting of schools in high-growth outer areas has been a pressing necessity in recent years. (See PX 3 at CM073068-69 (CMS Board Minutes of 1/12/88).) The schools currently operating there are overcrowded and in short supply. (Tr. 4/21 at 11-12 (Test. of Lindalyn Kakadelis).) This is a problem that CMS, not the Court, needs to solve. *See Swann,* 334 F.Supp. at 631 (App., Mem. of Oct. 5, 1970) ("Overcrowding, ... though undesirable, is not a constitutional problem; its solution is unrelated to desegregation; it is a matter for the School Board, not the court, to deal with.").

CMS self-critically points out that, since 1980, almost all newly constructed schools have been built in predominately white areas, while the newly constructed and renovated schools that have opened in predominately black areas have been limited to magnet schools. (DX 266 (CMS School Construction 1980 to Present).) If anything, this trend is a consequence of racial ***253** balancing requirements. Given the high concentration of blacks in the inner city, it is impracticable, if not impossible, to draw contiguous assignment zones in the inner city and racially balance them. (*See* PX 138 Fig. 9 (Clark Rpt.).) The only way to meet the racial balancing requirements in such a situation would be to transport white students in from satellite zones, which is difficult given the rush hour traffic patterns. (Tr. 4/22 at 12-14 (Test. of Sharon Bynum).) Also, experience has shown that it is more difficult to populate inner city black schools with suburban white students than vice versa. (PX 138 at 5 (Clark Rpt.); DX 108 at 6 (Stolee Plan).) While "white flight" cannot be used as an excuse for failing to desegregate a school system, a school board may consider this phenomenon in trying to improve racial balance under a desegregation order. *Riddick,* 784 F.2d at 528-29. As a result of these realities and the racial balance

requirements, CMS has had to create dozens of tiny satellite zones in the inner city to disperse blacks away, while simultaneously drawing white students inward with magnet schools. (DX 262-64 (CMS Satellite Zones).) Building more schools in the inner city would have exacerbated this racial balancing dilemma.

Finally, the Court notes that neither the Swann Plaintiffs nor anyone else ever called on the Court to intervene in these school siting decisions. These decisions were the subject of public hearings, televised meetings, and ballot referenda. (*See* Tr. 4/27 at 109 (Test. of Jonathan Wells).) Moreover, the board members who were the most aggressive advocates of desegregation policies, including CMS Chairman Arthur Griffin, supported and voted for many of these initiatives. (*See, e.g.*, Tr. 6/21 at 101-03, 116, 138 (Test. of Arthur Griffin); Tr. 5/17 at 37 (Test. of Pamela Mange); SX 119 at 4-5 (CMS Board Minutes of 5/28/96).) Thus, the Court does not find any continuing constitutional violations in the area of school siting.

As to the transportation burdens on black children, Judge McMillan addressed this problem in an Order dated June 29, 1971, stating: "The court is not prepared, however, on the present record at least, to find that [the disproportionate burden of busing on black children] is unconstitutional; it may be the only practicable present way to deal with the problem." *Swann*, 328 F.Supp. at 1349. The Court then predicted: "It is more likely to be a practical problem which the school board will eventually solve under the political realities of school administration." *Id.* The Court reaffirmed this view in its Order dated October 21, 1971, stating: "Absolute equality in apportioning the burdens of attaining desegregation in compliance with the Constitution is impossible to achieve."

Swann, 334 F.Supp. at 626. CMS represents that, during the most recent school year, 11,184 non-black students (42%) and 15,533 black students (58%) were transported for desegregation purposes. (CMS's Post-Trial Br. at 16.) Of course, a greater proportion of white students are bused voluntarily because they attend magnet programs, whereas more black students are bused due to mandatory assignments to certain schools. (Tr. 6/21 at 224-25 (Test. of Dr. David Armor).) On the other hand, students in magnet programs generally face much longer bus rides. (PX 43 (CMS Magnet Options 1998-99).) Given the realities of the situation, as noted above, the current situation may be about the best CMS can do while still adhering to racial balance guidelines.

e. The Historical Status of Imbalanced Schools

A look at the historical status of imbalanced schools, in light of demographic trends, further confirms that current imbalances are not traceable in a proximate way to the dual system. All of the former-*de jure* black schools still in operation have maintained consistent levels of racial balance for at least twenty-two years since 1970 despite the fact that they are located in neighborhoods that remain predominately *254 black. (PX 137 at 11, Table 2 (Armor Rpt.); PX 138 Fig. 9 (Clark Rpt.).) Only four of these schools-- Druid Hills, First Ward, Oaklawn, and West Charlotte--were imbalanced during the most recent school year. (DX 3 (CMS Enrollment Rpts.).) First Ward became imbalanced last year for the first time since court supervision began and was still only imbalanced by two percentage points. (*Id.*) West Charlotte, which has had a long-standing open enrollment program, did not become imbalanced until 1996. (*Id.*; PX 137 at 10 (Armor Rpt.).) Druid Hills and Oaklawn are currently imbalanced by

five percentage points. (DX 3 (CMS Enrollment Rpts.).) These two schools were originally desegregated through pairing, but, in the early 1990s, as their pairing areas grew substantially blacker, they were depaired and magnetized. (DX 5 at 11 (Foster Rpt.).) The magnet program at Oaklawn restored balance for about four years before going out of balance. (PX 137 at 9 (Armor Rpt.).) The magnet program at Druid Hills has not drawn enough white students to be within the +-15% variance; though, without the magnet program, it would be nearly all black. (*Id.*)

The overwhelming majority of former-*dejure* white schools have remained racially balanced since 1970. (*Id.* at 10-11, Table 2.) Ironically, of the schools that have been racially imbalanced and predominately black for more than three years, *see supra* note 17, most were historically white schools. They include: Briarwood, Derita, Devonshire, Highland, Sedgefield, Shamrock Gardens, Thomasboro, Westerly Hills, Cochrane, Eastway, Wilson, and Garinger. Since court-ordered desegregation began, CMS has made periodic adjustments to the assignment zones of these schools to counteract demographic trends. (DX 5 at 13-23 (Foster Rpt.); PX 137 at 8-10 (Armor Rpt.).) All of these schools, with the exception of Briarwood, Devonshire, and Cochrane, were racially balanced for twenty years or more, and almost none of the imbalance in these schools occurred until the 1990s. (PX 137 at 11, Table 2 (Armor Rpt.).)

Briarwood, Devonshire, and Cochrane are all located in the same proximity in Eastern Charlotte, just outside the inner city. (DX 5 Attach. E (Foster Rpt.).) This area has experienced a dramatic decrease in the white school-age population and a simultaneous increase in the black school-age

population. (PX 137 at 9 (Armor Rpt.); PX 138 Table 6, Figs. 2-9 (Clark Rpt.).) Briarwood, which has had sixteen years of racial balance, fell in and out of balance a couple times in the 1980s and has been imbalanced since 1990. (PX 137 at 11 (Armor Rpt.).) It is currently 84% black, the highest black student population the district has seen in thirty years, aside from Hidden Valley. (DX 3 (CMS Enrollment Rpts.).) Devonshire experienced the same trend as Briarwood, but it has reduced its previously high black population of 82% to 66% by recently adding a magnet program. (DX 5 at 16-17 (Foster Rpt.).) Cochrane, which is currently 75% black, is surrounded by other majority black middle schools, making it impracticable to change its boundaries. (PX 137 at 9 (Armor Rpt.).) In 1997, Cochrane adopted a communication arts magnet to help correct its growing imbalance. (*Id.;* DX 5 Attach. B, Table 5 at 5 (Foster Rpt.).) So far, the reduction in the black population at Cochrane has been slight. (PX 137 at 9 (Armor Rpt.).) Part of the racial balancing difficulties appear to stem from the high number of whites in this area who attend private schools. (PX 138 at 11-12 (Clark Rpt.).)

Of the schools that have been racially imbalanced and predominately white for more than three years, *see supra* note 18, most are located in the northernmost and southernmost regions of the county where the census tracts are virtually all-white. (PX 137 at 5 (Armor Rpt.); PX 138 Figs. 8-9 (Clark Rpt.).) Of these outer area schools, Bain, Matthews, McAlpine, McKee, South Charlotte, and Providence are located in census tracts that, in the ***255** most recent census of 1990, were 95% or more white. (PX 138 Figs. 8-9 (Clark Rpt.).) Clear Creek, Cornelius, Davidson Road, Huntersville, Lebanon Road, Mallard Creek, Alexander, and Davidson IB are located in outer area census tracts that, in 1990, were 75% to 95% white,

and almost all of these schools closely bordered census tracts that were 95% or more white.[27] (*Id.*) Only two of the schools in the imbalanced-white category--Randolph and East Mecklenburg--are located in the middle suburban ring around the inner city, an area that is closer to more racially mixed neighborhoods but which remains predominately white for these two schools. (*Id.;* DX 5 Attach. E (Foster Rpt.).) Randolph had a long history of racial balance until the 1992-93 school year. (DX 7 Ex. A-115 (Peterkin Rebuttal Rpt.).) It fell out of balance for six years but never had a black student body lower than 19%. (*Id.*) In the most recent school year, it had a 46% black student population. (*Id.*) East Mecklenburg fell out of balance for five non-consecutive years during the 1980s but never by more than two percentage points. (*Id.* at Ex. A-125.) It has remained racially balanced since the 1988-89 school year and, most recently, was 32% black. (*Id.*)

Given that the Court's earliest plans allowed some schools with black populations as low as 3%--coupled with the fact that the Court never explicitly established a minimum percent black enrollment--the Court is hesitant to find that the small black populations at schools in the outermost regions are vestiges of the dual system. *Cf. Jacksonville NAACP, supra* slip op. at 11 n. 10. Such racially identifiable schools are inevitable due to "the practicalities of the situation." *Davis v. Board of Sch. Comm'rs,* 402 U.S. 33,37,91 S.Ct. 1289,1292,28

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[27]Long Creek is the only outer area school in the imbalanced- white category that is located in a census tract that was 50% to 75% white in 1990; however, the school closely borders a large census tract that was 75% to 95% white. Long Creek did not fall out of balance until the 1991-92 school year and was back in balance with a 38% black population in the most recent school year. (*Id.*)

L.Ed.2d 577 (1971); *Swann,* 402 U.S. at 25-26, 91 S.Ct. at 1280-81. While many of these outer area schools maintained black enrollments at or near 20% in prior years, (DX 3 (CMS Enrollment Rpts.)), the white population in these areas has continued to grow. (PX 138 Fig. 8 (Clark Rpt.).) Consequently, it has become impracticable to achieve higher racial balance in the absence of large-scale mandatory busing efforts, which would only impose additional burdens on black students. (PX 137 at 5, 8 (Armor Rpt.); PX 138 at 12-13 (Clark Rpt.).)

f. Possibilities of Further Racial Balance

CMS and the Swann Plaintiffs assert that the system can improve its racial balance by making further adjustments in assignment zones, creating new satellite zones, and so on. Such measures are not required. *Swann,* 402 U.S. at 31-32, 91 S.Ct. at 1283-84 ("Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system."); *see also Freeman,* 503 U.S. at 493, 112 S.Ct. at 1447 ("[The Constitution does not] require[ ] 'awkard,' 'inconvenient,' and 'evenbizarre' measures to achieve racial balance in student assignments in the late phases of carrying out a decree."); *Morgan v. Nucci* 831 F.2d 313, 325 (1st Cir.1987) ("[E]ven if some upgrading of attendance patterns were reasonably possible, such fine tuning would not warrant the court's continued indefinite involvement.").

Despite having no obligation to do so, CMS, for years, has attempted to fix growing imbalances that were attributable

not to the prior *de jure* system but to independent demographic forces and private choice. While the Court's original plan created nine noncontiguous satellite zones, ***256** *Swann,* 402 U.S. at 9, 91 S.Ct. at 1273, today, there are sixty-nine satellite zones. (DX 262-64 (CMS Satellite Zones).) During the last decade, the continued expansion of desegregation strategies has had diminishing returns in achieving racial balance, causing CMS and the Swann Plaintiffs to assert that the system needs to remedy these mixed results. Yet, the Court's authority is limited to remedying vestiges of segregation; it has no authority to order remedial action for the shortcomings of nonmandatory desegregation practices. *Cf. United States v. City of Yonkers,* 181 F.3d 301, 325 (2d Cir.1999) (Sack, J., concurring in part and dissenting in part) ("Integration is not necessarily a vestige of segregation.").

A complete overhaul of the student assignment plan, as alternatively suggested by CMS, is likewise unnecessary. As an eleventh hour strategy, CMS presented a proposed student assignment plan just one week before trial. (*See* DX I (CMS's Proposed Remedial Plan) (proffered).)[28] This plan, which uses

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[28]Court excluded the plan on the grounds that the initial phase of the trial involved whether CMS had complied with the *Swann* orders up to the time of the present lawsuit. (Order of 4/14/99.) The Court said it would consider the plan only if it found additional remedial action was needed. (*Id.*) The Court was especially concerned that the plan--which is purely speculative and based on numerous contingencies--was introduced after the deadlines for fact discovery and expert witness discovery had expired, a violation of the pretrial order. (*Id.*)

the technique known as "controlled choice,"[29] was developed only in response to the *Capacchione* litigation. CMS and the Swann Plaintiffs insist that the Court must entertain the proposed plan before deciding unitary status. They argue that a unitary status determination may not focus solely on the existing court-ordered desegregation plan but also must inquire into whether there are other practicable means available to achieve further racial balance. The Court disagrees.

"A court should not remain involved in the assignment process indefinitely merely because some further degree of compliance with assignment standards is conceivable." *Morgan,* 831 F.2d at 324; *see Calhoun v. Cook,* 525 F.2d 1203, 1203 (5th Cir.1975) ("It would blink reality and authority, however, to hold the Atlanta School System to be nonunitary because further racial integration is theoretically possible and we expressly decline to do so." (citation omitted)); *cf. James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 542, 111 S.Ct. 2439, 2447, 115 L.Ed.2d 481 (1991) ("Public policy dictates that there be an end to litigation." (citations omitted)). It would greatly confound discovery and trial proceedings in a unitary status case if, at the last minute, the party seeking to prolong court supervision simply could offer up the latest 'soup du jour' in desegregation policy as an untried method. Here, CMS already has implemented numerous techniques under the guidelines of *Swann* including a feeder

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[29]Under such a plan, the school system would be divided up into large racially diverse geographic zones, and students could apply to any school in their designated zone, (Tr. 6/9 at 171 (Test, of Dr. Gordon Foster) (proffered).) CMS would give preferences to those applicants who live in walking distance of the school and those with siblings in the school. (*Id.*) The remaining seats would be filled based on racial preferences with the goal of achieving a certain racial mix at each school. (*Id.* at 174.)

plan, pairing and grouping, satellite zones, M-to-M transfers, stand alone schools, mid-point schools, and magnet schools. There always will be new, unused, and hypothetical education techniques and policies, just as there always will be new criticisms of the old policies. After all, the history of public education in America is a history of continual reform.

The Court declined to consider CMS's "litigation strategy" plan and therefore makes no finding as to whether it would achieve its stated goal of further racial balance. Rather, the Court observes that controlled choice is a technique that was ***257** never mandated by this Court, was not contemplated under the guidelines enunciated in *Swann,* 402 U.S. at 22-32,91 S.Ct. at 1279-84, and was not even presented to the Court until the eve of the most recent trial. *Cf, Jacksonville NAACP, supra,* slip op. at 118-19 (rejecting the argument that the board must "adopt measures [namely, controlled choice] in addition to, or substantially different from, those the parties agreed to, and which the Court ratified").

As such, consideration of the plan, at this late date, would not serve the broader objective of ensuring that court supervision not extend any longer than is strictly necessary. *Jenkins III,* 515 U.S. at 99, 115 S.Ct. at 2054; *Freeman,* 503 U.S. at 489-90, 112 S.Ct. at 1445. Furthermore, on its face, the plan's cardinal fixation on racial preferences raises significant equal protection implications. As discussed above, there are limitations on using race, even in the desegregation context. *See supra* part II.A. A court would be remiss if-thirty years down the road, when any causal connection to the dual system necessarily has dissipated--it mandated compliance with a plan that was even more race conscious than the original plan. As stated in *Freeman,* "[a] remedy is justifiable only insofar as

it advances the ultimate objective of alleviating the initial constitutional violation." 503 U.S. at 489, 112 S.Ct. at 1445; *see Swann,* 402 U.S. at 16, 91 S.Ct. at 1276 ("[T]he nature of the violation determines the scope of the remedy."). Here, the complete overhaul of the system would exceed the proper remedial scope.

The Court finds that CMS has complied fully and satisfactorily with the student assignment aspects of the court-ordered desegregation plan. The plan has achieved its objective of creating a unitary school system by eliminating the past vestiges of discrimination to the extent practicable.

2. Faculty Assignment

In the *Swann* Order of April 23, 1969, the Court examined the *post-Brown* faculty desegregation efforts of CMS, finding: "The Board makes no sustained effort to desegregate faculties." 300 F.Supp. at 1370. CMS's "passive selection policy," whereby the principal of each school selected the teachers for that school, had produced the following results:

> Of the thirteen all black schools in the system serving 8,840 students, only four have any white teachers. Those four have ten white teachers and 161 black teachers for 3,662 students. Few predominantly black schools have any substantial number of white teachers, except a few schools which serve areas rapidly turning from white to black. Eight other schools 99% or more black had only six white teachers among them for 5,246 black and 24 white pupils. Second Ward and West Charlotte High Schools, with 2,700 black students and

> three white students, have 131 black teachers and only nine white teachers.
>
> All of the white elementary schools have at least one and in a few cases as many as three or four black teachers. The proportions of black teachers in the junior and senior high schools run slightly higher. The system has not operated, however, to produce any substantial teaching of black students by white teachers.

Id. At the time, the faculty of CMS was about 26% black--roughly 900 out of 3,500 teachers. *Id.* Having found that the faculties remained virtually all- white or all-black, the Court directed the school board to submit a plan for the active and complete desegregation of teachers. *Id.* at 1373.

By August 15, 1969, the Court observed: "In the formerly all-black faculties the Board has dramatically exceeded its goal. It is assumed by the court that this process of faculty desegregation will continue and that the goal for 1970-71 will be that faculties in all schools will approach a ratio under which all schools in the system will have approximately the same proportion of black and white teachers." ***258***Swann,* 306 F.Supp. at 1295. On November 7, 1969, the Court again commented that "[f]aculty desegregation ha[d] significantly and commendably improved" but noted that "only six 'black' schools and one 'black' kindergarten ha[d] predominantly white faculties; and 98 out of the 106 schools and kindergartens in the system [were] readily and obviously identifiable by the race of the heavy majority of their faculties." *Swann,* 306 F.Supp. at 1302. In a Supplementary Opinion dated December 1, 1969, the Court stated that "[t]he defendants have admitted their duty to

desegregate the schools; considerable progress has been made toward desegregation of faculties." *Id.* at 1306. Still, "[n]ine-tenths of the faculties [we]re still obviously 'black' or 'white.'" *Id.* at 1308. The Court directed CMS to fully desegregate faculties by the beginning of the upcoming 1970-71 school year. *Id.* at 1313.

When the Court mandated a desegregation plan on February 5, 1970, it left the board-proposed faculty plan essentially intact, ordering: "That desegregation of faculty be accomplished, as previously ordered, by assigning faculty (specialized faculty positions excepted) so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio of black and white faculty members throughout the system." *Swann,* 311 F.Supp. at 268.[30] The Court also directed CMS to implement a continuing program to assign teachers "in a condition of desegregation." *Id.* at 269. By August 3, 1970, the Court acknowledged that [f]aculties have been assigned for all schools according to the February 5, 1970 order, so that when schools open in September all faculties will have about 75% White teachers and about 25% Black teachers. *Swann.* 318 F.Supp. at 790. During the remainder of *Swann,* the Court entered no further directives or findings regarding faculty assignment other than to restate the provisions of the Order of February 5, 1970. *See Swann,* 362 F.Supp. at 1225; *Swann,* 334 F.Supp. at 631.

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[30]The Court also ordered: "That teachers be assigned so that the competence and experience of teachers in formerly or recently black schools will not be inferior to those in the formerly or recently white schools in the system." *Id.* Compliance with this provision is analyzed below as an ancillary quality of education issue. *See supra* part II.B.7.a.

CMS maintained a centrally-controlled faculty assignment process until 1992, when it adopted a more site-based management system in which principals actively recruited teachers and were then held accountable for the results they achieved. (Tr. 5/28 at 25-26 (Test. of Gwendolyn Bradford); Tr. 4/26 at 118- 19 (Test. of John Murphy); Tr. 4/28 at 124-28 (Test. of Dan Saltrick).) Then-Superintendent John Murphy instituted this change as a way to improve the quality and competence of faculty and to achieve his goal of higher test scores for students. (Tr. 4/26 at 118-19 (Test. of John Murphy).) Current- Superintendent Eric Smith stated that this policy basically has continued, with CMS assisting in the recruitment of teachers to the district. (Tr. 6/8 at 172- 73 (Test. of Eric Smith).)

In addition, CMS recently implemented regulations that restrict the freedom of teachers to transfer schools if the transfer would affect the racial balance of the school. (Tr. 5/28 at 34, 47 (Test. of Gwendolyn Bradford).) Of course, CMS runs the risk of losing significant numbers of teachers if its faculty assignment policies become too restrictive. (*Id.* at 47-49.) Attracting good teachers often means giving them preferences in where they work, and teachers usually want to work near their homes. (Tr. 5/19 at 116-18, 121-22 (Test. of Calvin Wallace); Tr. 4/28 at 124 (Test. of Dan Saltrick).) In this way, residential demographics pose a practical obstacle to achieving and maintaining an ideal amount of racial balance because CMS cannot control where teachers live. (Tr. 5/19 at 116-18,121-22 (Test. of Calvin Wallace); ***259** Tr. 5/28 at 59-62 (Test. of Gwendolyn Bradford).)

Another practical problem faced by the district is the fact that it must constantly hire thousands of new teachers in

the midst of a national teacher shortage and a high turnover rate for teachers in economically-impoverished areas. (Tr. 5/27 at 45-47 (Test. of Dr. William Trent).) Gwendolyn Bradford, Executive Director of Human Resources for CMS, testified that the shortage of teachers is especially pronounced with regard to black teachers, particularly in this region of the country. (Tr. 5/28 at 45 (Test. of Gwendolyn Bradford).) *See also Coalition to Save Our Children v. State Bd. of Educ.* 90 F.3d 752, 767 (3d Cir.1996) (observing that the "critical shortage of black teachers in public schools" is "a manifestation of an unfortunate contemporary national trend"). The proportion of black faculty in CMS rose to about 30% in 1980 but has fallen to about 20% in the most recent year. (SX 3 at 6 (Smith Rpt.).) In response, CMS has instituted hiring policies aimed at drawing black teachers to the district. (Tr. 5/28 at 33-34, 79-80 (Test. of Gwendolyn Bradford).) Apparently, this has had some success because Bradford testified that CMS currently exceeds the state and national average for the number of minority teachers employed. (*Id.* at at 46.)

In assessing CMS's compliance with the faculty assignment order, the Court must be sensitive to these practical problems but also must scrutinize the level of racial balance in light of CMS's departure from the central monitoring of faculty assignment. The Court first notes that the faculty assignment order was never made any more numerically specific than requiring the racial composition of faculty at each school to reflect the district-wide average. The Court will examine CMS's racial balance in faculty using a +-15% variance, which is a commonly accepted standard. *See Coalition to Save Our Children,* 90 F.3d at 766 n. 21 ("Courts addressing unitary status motions typically have considered faculties within +- 15 percentage point of the district-wide minority composition to

be racially balanced). Indeed, recognizing the difficulty of achieving perfect balance, particularly with small elementary school faculties, some courts have applied a standard of +- 20 percentage points." (citing *Flax v. Potts,* 725 F.Supp. 322, 326-29 (N.D.Tex.1989), aff'd, 915 F.2d 155 (5th Cir.199)); *Pitts v. Freeman*, 887 F.2d 1438, 1447 (11th Cir.1989) affirming a +- variance for faculty as within the district court's discretion).

During the trial, the bulk of the evidence focused on the most recent school years given that CMS and the Swann Plaintiffs asserted that the worst imbalances in faculties occurred in the 1990s when the system instituted site- based management. The calculations made by the parties' experts varied due to the use of differing standards for compliance, the rounding off to different decimals, and the counting of "special school" faculties, which are inapplicable to the analysis.[31] The Court relies on the school-by- school faculty composition data presented in the report of Dr. William Trent, a CMS expert witness. (DX 10 App. C, Ex. 5, Tables 24-26 (Trent Rpt.).) Dr. Trent's report provided the racial percentages for faculty for school years 1995-96, 1996-97, and 1997-98. (*Id.*)

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[31]The Court does not include "special schools" in calculating faculty imbalance for the same reason that those schools are excluded from the student assignment analysis. *See supra* part I.B.1.b. Plus, "specialized faculty" are exempt from racial balancing requirements. *Swann,* 311 F.Supp. at 268. A certain background would be needed for faculty that deal with students who are mentally or physically disabled or pregnant or who have severe disciplinary problems. It would be unfair to enforce a prescribed racial balance in such schools. Also, it is somewhat misleading to count them as imbalanced schools because the faculties for these programs tend to be small, sometimes as few as four teachers. (*See* Tr. 5/19 at 55 (Test. of Calvin Wallace).)

The evidence from these recent years reveals a stark contrast to the Court's findings in 1969. No school has had an all-black faculty. (*Id.*) Only one school, Amay James Elementary, ever had an all-white ***260** faculty. (*Id.*) During the 1995-96 school year, Amay James--interestingly, a former-*de jure* black school, located in the inner city-had no blacks among its fifteen teachers. (*Id.*) This may have been due to the fact that the school had recently started a Montessori magnet program, which uses certified Montessori teachers. (DX 5 Attach. B, Table 5 at 3 (Foster Rpt.); PX 212 (CMS Facts & Faces).) Notably, the Court's order on faculty assignment excludes "specialized faculty positions," *Swann*, 311 F.Supp. at 268, and certified Montessori teachers are presumably included in this exemption.

Similarly, there have been no conspicuous cases of predominately black faculties. None of the 122 schools that CMS operated during the 1997-98 school year had majority black faculties. (*Id.* Ex. 5, Table 26.) As for the previous years, only two schools had black faculties exceeding 50%: Lincoln Heights Elementary was 59% black in 1995-96 and Cochrane Middle was 54% black in 1996-97. (*Id.* Ex. 5, Tables 24-26.)

Applying the +- 15% standard, well over 90% of the system's schools were within this variance even during the school years with the "worst" racial imbalance. During the 1997-98 school year, only ten schools exceeded the +- 15% variance: Briarwood Elementary (5.5% above), Druid Hills Elementary (7.4% above), First Ward Elementary (9.8% above), Oakdale Elementary (0.7% above), Westerly Hills Elementary (2.9% above), Albemarle Road Middle (2.5% above), Cochrane (8.3% above), Northeast Middle (2.1%

above), Wilson Middle (3.2% above), and Garinger High (1.1% above). (PX 137 (Armor Rebuttal Rpt.); *cf.* DX 10 App. C, Ex. 5, Table 26 (Trent Rpt.).) The previous school year saw only nine schools exceeding the +- 15% variance: Briarwood (12.5% above), Lincoln Heights (6.1% above), Tryon Hills Elementary (6.1% above), Westerly Hills (0.4% above), Cochrane (12.5% above), Ranson Middle (1.2% above), South Charlotte Middle (4.8% below), Wilson (4.2% above), and Garinger (3.3% above). (PX 137 (Armor Rebuttal Rpt.); *cf.* DX 10 App. C, Ex. 5, Table 25 (Trent Rpt.).)

CMS and the Swann Plaintiffs claim that site-based management led to a total disregard of the faculty assignment order, and they point to a 1992 memorandum written by Dr. Stolce to then-superintendent Murphy, cautioning that the faculties of fifteen schools were racially identifiable using a +- 10% variance from the district-wide ratio. (SX 56 (Mem. from Stolee to Murphy of 6/11/92); *see also* DX 71 (Mem. from Stolee to Murphy of 4/13/92).) It is unclear whether Superintendent Murphy ignored this warning. (Tr. 4/26 at 164-68 (Test. of John Murphy).) During the 1997-98 school year, only three of these fifteen schools remained outside a +- 10% variance: Eastover Elementary (1.9% below), Huntersville Elementary (1.7% above), and Albemarle Road Middle (7.5% above). (*See* DX 10 App. C, Ex. 5, Table 26 (Trent Rpt.); PX 137 (Armor Rebuttal Rpt.).) Of these, only Albemarle Road was outside the +- 15% variance. Thus, either something was done about the imbalances in the fifteen schools or the problem corrected itself.

CMS undoubtedly has achieved the type of balance one would find in a desegregated system. For example, the Third Circuit affirmed a unitary status finding where a school district

had satisfied a +- 10 standard in 80% of its schools for fifteen years. *Coalition to Save Our Children*, 90 F.3d at 766- 67 n. 21. CMS has matched this mark even according to the analysis of the district's own expert. Dr. Peterkin found that, from 1977 to 1997, 75% to 95% of the district's schools had racially balanced faculties in any given year based on a restrictive +- 10% variance; moreover, this analysis inflated the level of racial imbalance by including the faculties of special schools. (DX 6 Ex. 13d (Peterkin Rpt.).) *See also Flax*, 915 F.2d at 163 (upholding a unitary status declaration as to faculty even though six schools lay more ***261** than twenty percentage points outside the system-wide ratio).

In sum, CMS complied with the Court's faculty assignment provisions by reassigning faculty in large numbers early on and by maintaining a high degree of racial balance for many years thereafter. The Court has not had to revisit the issue of faculty assignment since 1970. Given CMS's trend of compliance, the Court likely would have granted unitary status as to faculty when site- based management was instituted in 1992. The remaining imbalance is too small to be considered indicative of a school system that is segregating its faculty. Plus, the deficiencies are generally attributable to factors outside CMS's control, such as the shortage of teachers and the impact of residential demographics on schools' faculty compositions. The Court therefore concludes that CMS has fulfilled the Court's mandate by desegregating its faculty to the extent practicable.

3. Facilities and Resources[32]

In contrast to student assignment and, to some extent, faculty assignment, where often a longer remedial period is expected, the remaining *Green* factors are amenable to more immediate compliance. As stated by the Supreme Court in *Swann:*

> When a system has been dual ..., the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment.

402 U.S. at 18, 91 S.Ct. at 1277. Thus, disparities in these areas are not likely to be grounds for prolonged judicial supervision. *See, e.g., Henry v. Clarksdale Municipal Separate School Dist.*, 433 F.2d 387, 388 n. 3 (5th Cir.1970) (finding immediate compliance with a desegregation order as to transportation, faculty, staff, extra-curricular activities, and facilities).

In the initial stage of the *Swann* case, the Court examined the various aspects of school operations to determine

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[32]The Court's analysis of the facilities Green factor does not encompass the issue of school siting, which is more appropriately addressed as an aspect of student assignment. *See supra* part II.B.1; *see also Martin*, 475 F.Supp. at 1328 (treating school siting as an aspect of pupil assignment).

whether vestiges of the dual system remained. In its Order of April 23, 1969, the Court concluded the following:

> No racial discrimination or inequality is found in the following disputed matters:
>
> ....
>
> The quality of the school buildings and equipment. The evidence showed the per pupil value of the land and buildings and equipment of the various schools. Average value of these items per pupil for elementary schools was $861; for high schools $1,229; and for senior high schools $1,567. Schools described by witnesses as 'white' ranged well up and down on both sides of that average figure and schools described by witnesses as 'black' showed a similar variation. Several of the oldest and most respected 'white' elementary schools in the county (Sharon Road and Steele Creek, for example) have very low per pupil facilities values. One of the newest but still all black high schools (West Charlotte) has one of the highest per pupil facilities values. The highest priced school (Olympic High) is totally desegregated (522 white and 259 black students). No racial discrimination in spending money or providing facilities appears.

Swann, 300 F.Supp. at 1366.

The Court reiterated this finding in its Order dated August 15, 1969: "The defendants contended and the court found in its April 23, 1969 order that facilities and teachers in the various black schools were ***262** not measurably inferior to those in the various white schools. It is too late now to expect the court to proceed upon an opposite assumption." *Swann*,

306 F.Supp. at 1298. In its Order dated October 21, 1971, the Court again stated: "[T]he formerly black schools are not shown nor suggested to be inferior in faculty, plant, equipment or program." *Swann,* 334 F.Supp. at 625. In 1975, just prior to the final "Swann Song" order, the Court awarded attorneys' fees to the Swann Plaintiffs, observing that they were the prevailing party "[e]xcept for the refusal of the court to find in the plaintiffs' favor ... regarding adequacy of physical plants and equipment and teacher quality." *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 66 F.R.D. 483, 484 (W.D.N.C.1975).

These findings establish that there were no vestiges of discrimination in facilities and resources at the initial stages of the *Swann* case and at the close of the case in 1975. Moreover, at no time since the Swann case was filed has the Court ever imposed any remedial measures addressing discrimination in the quality of facilities. Despite these findings, CMS and the Swann Plaintiffs assert that there are current disparities in facilities that require remedial action. They ask the Court to presume that such disparities are vestiges of segregation that are causally linked to the dual system. The Plaintiff-Intervenors counter that Judge McMillan's findings on facilities constitute collateral estoppel and law of the case as to that *Green* factor, thereby shifting the burden to CMS and the Swann Plaintiffs to show discriminatory intent.

"The principles of collateral estoppel or issue preclusion are applicable to school desegregation cases." *Riddick,* 784 F.2d at 531 (citations omitted). Thus, where a court previously granted unitary status, there can be no automatic presumption that racial disparitiesare causally linked to the dual system, and the burden of proof shifts back to the plaintiffs alleging

discrimination. *Id.* at 534. Here, the Court has never granted unitary status to CMS, nor has it partially withdrawn supervision as to facilities or any other *Green* factor. Then again, it was not clear that a court could incrementally withdraw its supervision in a desegregation case until the *Freeman* decision in 1992. 503 U.S. at 490, 112 S.Ct. at 1445.

Justice Souter's concurrence in *Freeman* suggests that, prior to the total dissolution of a desegregation order, a court may reassert control over a relinquished area without a new showing of discriminatory intent. *Id.* at 509, 112 S.Ct. at 1455 (Souter, J., concurring). Of course, the possible reassertion of control addressed by Justice Souter involved an aspect of school operations where discrimination was once found and subsequently remedied. *Id.* In the present case, the Court cannot "reassert" control over facilities because it never assumed control. Indeed, the Court refused to remedy any disparities in facilities because, after the issue was thoroughly litigated, it found no discrimination. Certainly, there was a reason for the Court to make such findings.

Because desegregation remedies must be premised upon constitutional violations, *Swann*, 402 U.S. at 22-23, 91 S.Ct. at 1279, "plaintiffs ... must prove intent and causation and not merely the existence of racial disparity." *Freeman*, 503 U.S. at 506, 112 S.Ct. at 1454 (Scalia, J., concurring) (citing *Bazemore v. Friday*, 478 U.S. 385, 407-09, 106 S.Ct. 3000, 3012-13, 92 L.Ed.2d 315 (1986) (White, J., concurring); *Washington v. Davis*, 426 U.S. 229, 245, 96 S.Ct. 2040, 2050, 48 L.Ed.2d 597 (1976)). Of course, at the outset of a desegregation case, a finding of intentional discrimination in one area of school operations warrants an inference that segregation in other parts of the system was also purposeful absent sufficient evidence to

the contrary. *Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 537, 99 S.Ct. 2971,2978-79, 61 L.Ed.2d 720 (1979); *Keyes v. School Dist. No. 1,* 413 U.S. 189, 206-14, 93 S.Ct. 2686, 2696-700, 37 L.Ed.2d 548 (1973). The express ***263** findings of the Court in *Swann* show that CMS overcame this inference as to certain areas of school operations, including the quality of facilities. 300 F.Supp. at 1366-67. Thus, it would defy logic to place now the burden of proof on the Plaintiff-Intervenors, requiring them to prove that vestiges of discrimination in facilities have been remedied, when the Court originally found no vestiges to exist. See *City of Yonkers,* 181 F.3d 301, 305 n.*I ("[I]n the absence of findings that there are vestiges ....the burden is properly placed on the parties that desire to prolong judicial oversight.").

In any event, the Court heard a great deal of testimony on the alleged racial disparities in facilities. Many witnesses, including school board members, testified that there are disparities in the quality of facilities throughout the system. (*See, e.g.,* Tr. 4/20 at 189) (Test. of John Lassiter) ("[A]ll schools are not equal."); Tr. 4/21 at 126 (Test. of Lindalyn Kakadelis) ("[F]acilities need to be upgraded."); (Tr. 4/22 at 108 (Test. of Velma Leake) ("[F]acilities were not adequate across the district.").) This is not surprising in a system with 135 schools. Witnesses debated whether such disparities appear along racial lines, however. For the most part, witnesses only offered anecdotal evidence, which rarely, if ever, suffices to show a systematic pattern of discrimination justifying remedial action. *Wessmann v. Gittens,* 160 F.3d 790, 805-06 (1st Cir.1998) (*citing Coral Const. Co. v. King County,* 941 F.2d 910, 919 (9th Cir.1991)). Leaving aside the reliability problems of anecdotal evidence, the Court could not draw any consistent conclusions from such testimony.

For example, Jane McIntyre, a school board member from 1987 to 1995, complained of disparities in facilities she observed in the mid-1970s when her daughters were bused to First Ward Elementary, which was located in the middle of an inner city public housing area. (Tr. 5/13 at 126-32 (Test. of Jane McIntyre).) First Ward, as she described it, had "trash everywhere" and was surrounded by a chain-link fence with "barbed wire." (*Id.* at 128-30.) Compared to the "very well maintained" Landsdowne Elementary, the predominately white school where her daughters started their education, the conditions at First Ward were "unnerving." (*Id.* at 126-27, 129.) Since that time, though, CMS has spent a great deal of money improving First Ward--$2,910,308 in 1987 and a proposed $1,848,000 from 1997 bond money--to the point where, today, it is arguably a more attractive school than Landsdowne. (*Id.* at 176-82, 184-85.)

The problem of comparing just a handful of schools was similarly illustrated with Susan Purser, Associate Superintendent of Educational Services for CMS. Purser testified that she visited a variety of schools when she first came to CMS in the 1996-97 school year, and, right away, she noticed the difference between Elizabeth Lane Elementary, a predominately white school that was "very adequately equipped," and Shamrock Gardens Elementary, a predominately black school with "dingy" classrooms. (Tr. 6/14 at 81-82 (Test. of Susan Purser).) On cross-examination, counsel presented Purser with a recent inventory survey conducted by CMS to determine schools' baseline needs. *Id.* at 112-31. In comparing Hidden Valley Elementary (95% black) with McAlpine Elementary (4% black), McAlpine appeared to have much greater needs than Hidden Valley. *Id.* Thus,

different generalizations can be made depending on which two schools one picks to compare.

Likewise, Annelle Houk, former chair of the League of Women Voters education committee, recited a number of problems she observed in predominately black schools, recounting that, in one school, the PTA had to raise money just to buy toilet paper. (Tr. 5/14 at 11-12 (Test. of Annelle Houk).) On cross- examination, counsel questioned Houk about a 1992 survey conducted by the League of Women Voters ***264** that compiled the "urgent basic needs" of various schools in the district. (*Id.* at 64.) Most of the schools listed in the survey with urgent needs were racially balanced, while others were identifiably white or black. (*Id.* at 64-85.) In fact, the survey revealed that the school she said was in need of toilet paper was Marie G. Davis Middle School, a racially balanced, majority white school. (*Id.* at 78-80.)

Expert witnesses also offered testimony on the quality of facilities. Dr. Armor testified for the Plaintiff-Intervenors that there were no racial disparities in facilities. (Tr. 4/29 at 113 (Test. of Dr. David Armor).) While the Court ultimately concludes the same, it does not rely on Dr. Armor's testimony for two reasons. First, his testimony on facilities was of limited usefulness due to his lack of experience in facilities planning. (*Id.* at 7- 10.) Second, having no full database on the quality of CMS's facilities, he attempted to evaluate the system's facilities by reviewing CMS's parental satisfaction surveys[33] and by visiting selected schools.[34] (*Id.* at 108-09.)

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[33]The surveys showed that parents overall, black and white, were satisfied with the facilities where they sent their children and that, in some categories, black parents were more satisfied than white parents. (*Id.* at

Such non-random methodologies provide an inadequate basis to form a reliable expert opinion under Rules 702 and 703 of the Federal Rules of Evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993). To his credit, Dr. Armor admitted that his samples were not random, (Tr. 4/29 at 113 (Test. of Dr. David Armor)), and he offered no conclusion as to the unitariness of facilities, stating that he did not have adequate information. (*Id.* at 243-44.)

CMS called Dr. Dwayne Gardner as a facilities expert to testify that schools in predominately black areas are in greater need of improvement than those in predominately white areas. (Tr. 5/24 at 121 (Test. of Dr. Dwayne Gardner).) Dr. Gardner conducted physical inspections of 73 schools--slightly more than half of the system's 135 schools. (DX 13 at 5 (Gardner Rpt.).) Each inspection lasted approximately two to three hours. (*Id.* at 2.) He visited all schools that CMS deemed either (1) identifiably black or (2) racially balanced but located in a predominately black area. (*Id.* at 5-6.) The remaining schools--a sampling of those that did not fall into the first two categories--were likewise selected by CMS, which raises obvious concerns about the independence and reliability of the sample. (Tr. 5/24 at 186-87 (Test. of Dr. Dwayne Gardner).) Based on these inspections and other CMS documents, Dr.

11-12.)

[34]Armor visited thirteen schools, spending roughly an hour at each one, and also drove by various others to get a "representative sample." (*Id.* at 112-14.) He concluded that he was "impressed with the overall operations of these facilities." (*Id.* at 113.)

Gardner assessed the quality of each school by assigning it a rating from 1-100 in the following areas: adequacy, safety, healthfulness, accessibility, flexibility, efficiency, expansibility, and appearance. (*Id.* at 2.) He then made a composite score for each school and grouped the schools into the following categories: 0-44 (suggests replacement), 45-59 (needs major improvement), 60-74 (needs minor improvement), 75-89 (serves program needs), and 90-100 (exceptional quality). (*Id.* at 4-5.)

Aside from the lack of a truly random sample and the inherent subjectivity in rating schools based on criteria not rigidly quantifiable, the results of Dr. Gardner's analysis do not show disparities along racial lines. For example, of all the schools he assessed, a total of four schools fell into the lowest category, which suggests that the facility is so inadequate it needs replacement. Druid Hills Elementary and Highland Elementary--both imbalanced- black schools based on the +-15% standard--had respective scores of 44 and 43. (*Id.*, Att. C, Ex. I at 1.) Elizabeth Traditional Elementary and Myers Park Elementary--***265**both majority white schools in predominately white neighborhoods--had respective scores of 38 and 41, the two lowest scores in the district. (*Id.*, Att. C, Ex. I at 4; Tr. 5/24 at 175-78 (Test. of Dr. Dwayne Gardner.)) The two highest scores for CMS elementary schools were 82 for Davidson Elementary, a predominately white school in a predominately white neighborhood, and 79 for Morehead Elementary, a school with a 60% black student population. (DX 13, Att. C, Ex. I (Gardner Rpt.).)

While none of the schools scored in the 90-100 category, a majority of the schools scored in the 45-59 category, indicating a need for major improvements. (Id.) Sixteen

identifiably black schools fell into the "needs major improvement" category, while eighteen identifiably white and eight racially balanced schools fell into that category. (*Id.*) It must be remembered that Dr. Gardner analyzed *every* identifiably black school in the system, while he analyzed only a *sampling* of schools deemed racially balanced or identifiably white, so the latter two categories are likely to have even more schools needing major improvements. (*Id.* at 5-6.)

In sum, Dr. Gardner's report demonstrates that CMS's facilities needs are spread across the system without regard to the racial composition of its schools. Dr. Gardner was unable to trace any current disparities to the dual system. (Tr. 5/24 at 152-58 (Test. of Dr. Dwayne Gardner).) The only cause of disparities that Dr. Gardner identified was related to the age of respective facilities. He stated that different building standards[35] apply when a new facility is constructed as compared to when an older facility is renovated or upgraded. (*Id.* at 125.) In other words, the renovation of an older facility usually complies with the code under which the facility was built. Because most facilities in the predominately black inner city are older while facilities in the predominately white suburbs are newer, the inference is that differences in building standards tend to affect black students disproportionately. This does not amount to racial discrimination. Indeed, this practice applies regardless of the racial composition of the school. (*Id.* at 142-143.) Thus, older schools that are predominately white-- several of which were built in the 1920s, (DX 13, Att. C, Ex. 1 at 4 (Gardner Rpt.))--are likewise affected by this practice.

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[35]Curiously, Dr. Gardner was at a complete loss to explain what these standards were. (*Id.* at 147-50.)

The testimony of the CMS employee ultimately responsible for the maintenance of facilities echoed the findings of Dr. Gardner. William Booker, Assistant Superintendent for Building Services, was similarly unaware of any evidence that would link present inequities with the *de jure* discriminatory system. (Tr. 4/30 at 154-56 (Test. of William Booker).) Instead, he acknowledged that building codes and educational specifications change year-to- year and that the older a school gets, the more difficult it becomes to perform basic upgrades. (Tr. 5/25 at 19 (Test. of William Booker).) He testified that a large majority of schools-108 out of 135 or roughly 80% of them--are in need of renovations, and most of these needy schools-80 out of 108 or roughly 75% of them--have racially balanced student populations. (Tr. 4/30 at 142-45 (Test. of William Booker).) The primary reason for these inequities has been a shortage of funds and the need to focus scarce resources on critical areas first. (*Id.* at 151-54.)[36]

A particularly pressing need has been to build schools in areas with "significant growth and significant overcrowding." (Tr. 4/20 at 191 (Test. of John Lassiter).) Sharon Bynum, a former school board ***266** member who served from 1986 to 1996, stated that the "extreme influx" of people into the outer regions of the county made it difficult to keep up with the maintenance of older facilities. (Tr. 4/22 at 26 (Test. of Sharon Bynum).) Plus, in the 1980s, the maintenance department was not managed well. (*Id.* at 25.) Once that department was reorganized, the problem of funding remained.

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[36]Booker insisted that the Board's failure to direct employees to upgrade older schools also contributed to inequities. (*Id.*) Of course, this still goes back to funding. Had there been sufficient funds, CMS would have been able to adequately address the inequities.

(Id. at 25-26.)

In the early 1990s, CMS commissioned a report, known as the Heery Report, to determine the cost necessary to update and rehabilitate all physical facilities in the system. (Tr. 5/19 at 28-30 (Test. of Calvin Wallace).) The estimated cost was roughly $750,000,000, an amount that CMS has never had available for such purposes. (Tr. at 29, 34.) To paraphrase a statement by one attorney, the problem is not black or white; it's green. (Tr. 6/22 at 141 (Closing Argument of Lee Parks).)

Nevertheless, CMS continues to use its best efforts to renovate old facilities. (Tr. 4/30 at 156 (Test. of William Booker).) Perhaps the most crucial "equity safeguard" in place is CMS's practice of allocating funds on a per-pupil basis.[37] (Tr. 6/14 at 102 (Test. of Susan Purser); Tr. 5/19 at 35-36 (Test. of Calvin Wallace).) Most recently, CMS implemented baseline standards to assure that all facilities in the system are upgraded to comply with the most state-of-the-art standards. (DX 133 at 29-30 (Future School Planning Task Force Rpt.); Tr. 4/22 at 116 (Test. of Velma Leake); Tr. 5/24 at 26 (Test. of John Kramer); Tr. 6/14 at 58 (Test. of Susan Purser); Tr. 6/18 at 177-78 (Test. of Arthur Griffin).) These were actions that CMS took on its own initiative; the Court did not order it to do so.

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[37]Of course, PTA funding and other outside contributions, such as corporate donations, may cause disparities, but CMS has no control over this. *See Swann,* 300 F.Supp. at 1366-67 ("Parents contribute to school projects through voluntary Parent-Teacher Associations. This voluntary parental action is not racial discrimination against children whose parents are less able to make such contributions, and it does not come about through state action.").

Moreover, CMS has spent a large portion of bond money on improving schools in predominately black areas. (DX 63 (compilation of bond expenditures for 1985, 1987, 1991, 1993, and 1995).) One board member stated that "since 1993, we have spent somewhere in the neighborhood of $500,000,000 trying to renovate older facilities that had gone untouched in prior Board activity." (Tr. 4/20 at 196 (Test. of John Lassiter).) As discussed above, several old facilities have been overhauled completely. CMS also has received an infusion of federal funds toimprove inner city schools by magnetizing them. (Tr. 4/22 at 27-28 (Test. of Sharon Bynum).) While some magnet schools still need renovations, they have not failed to draw students. (Tr. 4/20 at 213-14 (Test. of John Lassiter).) Also, some predominately black schools have won awards for their educational programs despite perceived deficiencies. (Tr. 5/18 at 24-25 (Test. of William McMillan).)

Just as Judge McMillan found thirty years ago, the Court finds today that inequities in facilities exist throughout the system regardless of the racial makeup of the school. These disparities are generally the result of the relative ages of the facilities, combined with an ongoing lack of funding and the need to accommodate unprecedented growth. As one former board member remarked:

> [N]obody intentionally ever focused on particular schools and said, forget them, let's spend the money over here. We did what we had to do. When the growth got so out of control in this county and we had to build new schools, we weren't going to put old resources in that school, you can't even buy those. You are going to put new resources in them. So, of course,

> the new schools had better walls and better cabling and software and so forth than some of the other schools did. It was a game of ***267** catch up constantly without enough money for it.

(Tr. 4/22 at 51 (Test. of Sharon Bynum).)

Most notably, the Swann Plaintiffs have failed to overcome the Court's previous findings on facilities by establishing the requisite discriminatory intent and causation.[38] Despite thorough questioning throughout the two-month trial, none of CMS's current and former board members or employees could testify about intentionally discriminatory policies in the area of facilities. (*See, e.g.*, Tr. 4/20 at 196-98 (Test. of John Lassiter); Tr. 4/21 at 15,218-19 (Test. of Lindalyn Kakadelis); Tr. 4/22 at 48-50 (Test. of Sharon Bynum).) Likewise, no witness was able to provide any evidence to show a causal link between current disparities in facilities and the dual system. (*See* Tr. 5/24 at 152-58 (Test. of Dr. Dwayne Gardner); Tr. 4/30 at 154-56 (Test. of William Booker).) As such, there is no need for the Court to assume supervision over CMS's facilities. CMS is capable of addressing the inequities in its facilities without a court order and has shown that it is committed to doing so. Therefore, the Court belatedly grants unitary status to CMS as to the *Green* factor of facilities.

4. Transportation

With regard to the factor of transportation, a court may

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[38]On the other hand, the Court finds that the Plaintiff- Intervenors have proven, to the extent possible, the absence of intent and causation.

grant unitary status when transportation is provided on a non-discriminatory basis. *Coalition to Save Our Children,* 90 F.3d at 768; *Jacksonville NAACP, supra,* slip op. at 136-37; *United States v. Unified School Dist.,* 974 F.Supp. 1367, 1380-81 (D.Kan.1997). Here, the Court ordered "[t]hat transportation be offered on a uniform non-racial basis to all children whose reassignment to any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance." *Swann,* 311 F.Supp. at 268. CMS has complied fully and satisfactorily with this requirement.

Indeed, CMS provides free bus transportation to all students who do not live within a mile and a half of their schools, regardless of whether they attend their assigned schools or magnet schools. (PX 19 at 3 (CMS Facts); Tr. 5/21 at 16 (Test. of Eric Becoates).) According to a 1994 r[illegible]t, this cost CMS roughly $75,000 per day. (DX [illegible] at 8 (Committee of 25 Rpt.).) Last year, 81,967 students--roughly 83% of CMS's current enrollment--were assigned to buses. (DX 215 (1998-99 CMS Facts).) Thus, rather than being a vestige of past discrimination, CMS's transportation practices have been designed to effectively remedy the remnants of segregation in student assignments. *Accord Dowell v. Board of Educ.,* 778 F.Supp. 1144, 1177 (W.D.Okla.1991) ("[F]ar from being a vestige of prior segregation, transportation was actually the principal tool utilized to eliminate prior segregation.").

The Swann Plaintiffs concede that "[t]he district does not discriminate in providing transportation to students." (Swann Pl.'s Proposed Findings of Fact and Conclusions of Law at 114.) Nevertheless, CMS and the Swann Plaintiffs

argue that prolonged supervision of transportation is needed because a disproportionate burden of busing falls on black children. This issue was addressed above, *see supra* part II.B.1.d, and the Court need not address it again here as it is most appropriately treated as an aspect of student assignment. *See Martin,* 475 F.Supp. at 1328-29 (treating transportation burdens as an aspect of pupil assignment).

The Court finds that CMS has complied with the order to provide bus transportation in a nondiscriminatory manner. As such, there is no need to extend supervision over this *Green* factor.

***268 *5.* Staff Assignment**

During the early active phases of *Swann,* the Court never made findings of discrimination in staff assignment. Perhaps as a precautionary measure, the Court simply ordered "[t]hat the internal operation of each school, and the assignment and management of school employees, of course be conducted on a non- racial, non-discriminatory basis." *Swann,* 311 F.Supp. at 269. Since then, and during the recent trial in this case, CMS and the Swann Plaintiffs have presented no evidence of racial discrimination or disparities in the hiring or assignment of staff.[39] Indeed, the parties' post-trial briefs do

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[39]Based on the racial identities of the CMS staff members who testified at trial, it is apparent that blacks hold many important positions of authority in the various areas of school operations. While this is obviously too small a sample size from which to base any conclusions, it simply shows that blacks occupy positions of influence in CMS's administrative hierarchy. *See Morgan,* 831 F.2d at 321 ("Minority presence in the power structure is a factor that might be expected to help prevent regression to a dual system once the court's presence is withdrawn." (citing *Riddick,* 784

not even address the issue of staff assignment. While the parties addressed the issue of faculty assignment, which is a separate *Green* factor from staff assignment, they always focused solely on teachers and not on administrative staff or personnel. The Court finds that CMS has complied with the order on staff assignment; therefore, there is no basis for prolonged supervision over this *Green* factor.

6. Extracurricular Activities

At the initial stages of *Swann,* the Court made no comprehensive findings in the area of extracurricular activities. In its Order of April 23, 1969, the Court found that there was "no racial discrimination or inequality" in the "coaching of athletics." 300 F.Supp. at 1366. Stated the Court: "Several black coaches have been employed at 'white' schools. No black coach was shown to have applied and been refused a job. No pattern of discrimination appears in the coaching ranks." *Id.* On June 20, 1969, the Court struck a proposed provision in CMS's pupil assignment plan that had a racially discriminatory effect on black student athletes.[40] *Swann,* 300 F.Supp. at 1384. Other than these narrow findings, the Court did not address whether vestiges of past discrimination existed in extracurricular activities.

In the current stage of the case, CMS and the Swann Plaintiffs assert that prolonged supervision is needed. Yet, the evidence persuasively shows otherwise. Dr. Peterkin, who

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F.2d at 528)).

[40]The provision made students who transfer from one high school to another ineligible for high school athletics for one year.

testified for CMS about the system's educational opportunities, tabulated the racial breakdown in extracurricular involvement for the three most recent school years. (DX 6, Ex. 5a (Peterkin Rpt.).) The results show that participation in athletics occurs proportionately to the district-wide racial average. (*Id.*) As for student government, participation is equal at a roughly 50-50 ratio, and in two of the three years examined, blacks outnumbered whites as far as holding office. (*Id.*) Blacks also generally participated at a higher rate in a category labeled "school activity." (*Id.*) On the other hand, black student participation in honors societies and other clubs was lower, representing approximately 20% of those students involved. (*Id.*)

The Swann Plaintiffs concede that "the evidence in the case shows generally favorable statistics on extracurricular involvement." (Swann Pl.'s Proposed Findings of Fact and Conclusions of Law at 114.) Still, CMS and the Swann Plaintiffs assert that lower black student participation in honors societies and other academically-related clubs is grounds for continued court supervision. While black student participation in certain clubs may be lower than white student participation, the Court can make no finding that this is discriminatory, ***269** especially when participation in extracurricular activities is voluntary or, in the case of honors societies, requires a certain level of academic achievement for membership. As stated by the Third Circuit: "We cannot, however, expect a school district to compel or deny student participation in non-compulsory extracurricular activities merely to effect a racial balance." *Coalition To Save Our Children,* 90 F.3d at 768. Furthermore, it would be beyond a court's power to require that student participation in extracurricular activities reach a prescribed racial percentage or ratio. *See Coalition to Save*

Our Children v. State Bd. of Educ., 901 F.Supp. 784, 806 (D.Del.1995) (finding no precedent for imposing a measure of compliance to determine whether unitary status has been achieved in the area of extracurricular involvement), *aff'd*, 90 F.3d 752 (3d Cir.1996).

"[A] school district's extracurricular activities are unitary if they 'are available to all students within the School District regardless of race.' " *Coalition to Save Our Children*, 90 F.3d at 768 (quoting *Singleton v. Jackson Mun. Separate School Dist.*, 541 F.Supp. 904, 908 (S.D.Miss.1981)); *Jacksonville NAACP, supra*, slip op. at 138. Here, there is no evidence that CMS prevents any student from participating in any extracurricular activities. A wide variety of extracurricular activities are available in all schools. Some witnesses have suggested that the absence of a chess club at certain predominately black schools is discriminatory. (Tr. 6/14 at 74-75 (Test. of Susan Purser).) To suggest that Article III powers must be invoked to start chess clubs is a stretch. CMS is the party that raised this as a reason for continued supervision, and CMS could have started several chess clubs in the time that it took to put on such evidence. Even so, without student interest and initiative, a chess club will never last. Furthermore, there is no evidence that students, parents, faculty, or others are clamoring for such clubs in the schools where they do not exist.

CMS's anecdotal evidence regarding discrimination in extracurricular activities was unconvincing. School Board Chairman Griffin testified about a high school principal who was going to hold an unprecedented runoff election in the Miss South Mecklenburg competition after a black female received the most votes. (Tr. 6/18 at 172 (Test. of Arthur Griffin).)

Superintendent Smith quickly intervened and prevented the runoff from happening. (*Id.*) Here again, if CMS is asserting that the extraordinary remedy of court supervision is needed to referee a beauty pageant, this is clearly overkill.

Griffin also asserted that the long distances students are bused to school inhibits after-school involvement in extracurricular activities. (Tr. 6/18 at 125 (Test. of Arthur Griffin).) If anything, this is a strong argument for neighborhood schools. Griffin testified that special bus transportation is provided for students involved in athletics but not for non-athletic activities. (Id.) The Court heard no evidence as to the extent that this is a problem, but the fact that CMS raised the issue and stands ready to address it obviates the need for further court supervision.

Finally, CMS argues that it must monitor student participation in extracurricular activities by race in order to achieve unitary status. (DX 6 at 7 (Peterkin Rpt,); Tr. 6/17 at 186 (Test. of Dr. Robert Peterkin).) Whatever good monitoring would do, this was never a requirement imposed by the Court, and the Court will not impose such a requirement at this late date. In sum, there was no credible evidence produced at trial regarding alleged discrimination in extracurricular activities. Therefore, the Court finds no basis for prolonged supervision over this Green factor.

7. Ancillary Considerations

CMS and the Swann Plaintiffs raised a laundry list of quality of education concerns ***270** for the Court to consider in determining unitary status. Such factors, which a court may

consider in its discretion, *Freeman,* 503 U.S. at 492, 112 S.Ct. at 1446, are addressed below.

a. Teacher Quality

During *Swann,* the Court never found that there was discrimination in the quality of teaching. In fact, the Court observedin 1969 that "teachers in the various black schools are not inferior to those in the various white schools." *Swann,* 306 F.Supp. at 1298. Nevertheless, as part of the desegregation plan mandated in 1970, the Court ordered: "That teachers be assigned so that the competence and experience of teachers in formerly or recently black schools will not be inferior to those in the formerly or recently white schools in the system." *Swann,* 311 F.Supp. at 268. This was likely a "safeguard" provision in light of the massive reassignment of faculty under the 1970 plan. *See Swann,* 300 F.Supp. at 1373. By 1971, the Court stated that "the formerly black schools are not shown nor suggested to be inferior in faculty." *Swann,* 334 F.Supp. at 625. Also, right before closing *Swann* in 1975, the Court reiterated that it did not find in the Swann Plaintiffs' favor on the issue of discrimination in teacher quality. *Swann,* 66 F.R.D. at 484.

In the present case, CMS and the Swann Plaintiffs assert that the district has been operating identifiably black schools with inferior faculties in violation of the Court's order. Determining whether CMS has violated the safeguard provision is a formidable task, however, because teacher competence is not easily measurable. Also, given that the provision was not remedial--in the sense that it was not aimed at eliminating a past condition in the schools--it is difficult to assess compliance by comparing past and present circumstances. *Cf. Keyes v. Congress of Hispanic Educators,* 902 F.Supp. 1274,

1281 (D.Colo.1995) ("The constitutional authority of the federal courts is limited to compelling the elimination of negative effects of *de jure* discrimination; it does not include the power to posit any particular affirmative achievements.").

CMS and the Swann Plaintiffs base their argument of noncompliance on a comparison of the district's schools during recent years, looking specifically at the years of teachers' experience and the percentage of teachers with advanced degrees. (DX 6 at 4-5 (Peterkin Rpt.); DX 10 at 2 (Trent Rpt.); SX 3 at 9-12, Tables III-V (Smith Rpt.).) It is unclear whether the inferiority or superiority of a given faculty in the district can be determined by these characteristics. In fact, there is a debate in the research literature regarding the effect of teacher experience and education on student achievement. (Tr. 5/27 at 44-45 (Test. of Dr. William Trent).) Trial witnesses also debated the issue. Some CMS employees testified that veteran teachers generally provide better educational experiences for students. (Tr. 5/14 at 153-54 (Test. of Richard McElrath); Tr. 5/25 at 182-83 (Test. of Teresa Cockerham); Tr. 6/14 at 25-26 (Test. of Susan Purser). On the other hand, Dan Saltrick, former-CMS Assistant Superintendent for Instructional Services, testified that he did not equate teachers who had less experience with those who were less qualified. (Tr. 4/28 at 125-26, 128-29) (Test. of Dan Saltrick).) "It was just the opposite in many cases," stated Saltrick, who observed that many of the newest teachers were better prepared in their use of technology in the classroom, in their knowledge of various teaching strategies, and in their ability to deal with diversity. (*Id.*)

Also, CMS's Director of Human Resources testified that there is no correlation between the race of a teacher and a

teacher's competence. (Tr. 5/28 at 45 (Test. of Gwendolyn Bradford).) Apparently, this is so despite the fact that black teachers in the district, when compared to their white counterparts, have, on average, more years of teaching experience and also have a higher proportion of advanced degrees. (*271 DX 10 App. C, Ex. 2, Tables 2-3 (Trent Rpt.).)

In any event, the differences in teachers' experience is relatively small among the district's schools. (PX 137 (Armor Rebuttal Rpt.); Tr. 6/21 at 190-92 (Test. of Dr. David Armor).) During the 1998-99 school year, the average number of years of teaching experience in the district was 10.9 for elementary school teachers, 9.0 for middle school teachers, and 12.5 for high school teachers. (DX 6 Ex. 2a (Peterkin Rpt.).) In imbalanced-black schools, i.e., schools with black student bodies above +15% from the district-wide average, the average experience was 9.6 years for elementary school teachers, 8.2 years for middle school teachers, and 11.8 years for high school teachers. (*Id.*) In imbalanced-white schools, i.e., schools with black student bodies below -15% from the district-wide average, the average experience was 12.5 years for elementary school teachers, 9.8 years for middle school teachers, and 14.2 years for high school teachers. (*Id.*) Thus, on average, teachers in imbalanced-black schools had 0.7 to 1.3 fewer years experience than the district averages and had 1.6 to 2.9 fewer years experience than teachers in imbalanced-white schools. (*Id.*)

During the same year, the average percentage of teachers with advanced degrees in the district was 31% for elementary schools, 27% for middle schools, and 37% for high schools. (DX 6 Ex. 2a (Peterkin Rpt.).) In imbalanced-black schools, the average percentage was 26% for elementary

schools, 24% for middle schools, and 31% for high schools. (*Id.*) In imbalanced-white schools, the average percentage was 36% for elementary schools, 33% for middle schools, and 46% for high schools. (*Id.*) While the difference with this teacher characteristic is more noticeable, it must be remembered that the large presence of teachers with master's degrees may be a relatively new phenomenon, which would mean that this disparity is not a vestige that is traceable to the dual era.

A more meaningful way to examine CMS's distribution of teacher experience and advanced degrees is to examine the impact of these characteristics on students' test scores. Dr. Trent suggested that differences in teachers' experience and education influence student performance in CMS, (DX 10 at 2 (Trent Rpt.)), but the results of his regression analyses show that there is no statistically significant effect of these teacher characteristics on academic achievement. (PX 137 (Armor Rebuttal Rpt.); Tr. 6/21 at 148-51 (Test. of Dr. David Armor).) Thus, it would appear that the competence and experience of faculty is not unevenly distributed.

Moreover, whatever small disparities exist are likely mitigated by the more favorable pupil-teacher ratios in predominately black schools. (PX 137 (Armor Rebuttal Rpt.); Tr. 4/28 at 123-24 (Test. of Dan Saltrick).) Classrooms in majority black elementary schools have, on average, a little over fifteen students, which is, on average, about five or six students less than in elementary schools that are more than 80% white. (PX 137 (Armor Rebuttal Rpt.).) Smaller class sizes mean that students receive more teacher attention and more instructional time. (Tr. 4/28 at 123-24 (Test. of Dan Saltrick).) Thus, in terms of allocating teacher competence as an educational resource, students in schools with higher black

ratios may receive fuller benefits from a teacher's experience and education. (Tr. 6/21 at 152-53 (Test. of Dr. David Armor); Tr. 4/28 at 123-24 (Test. of Dan Saltrick).)

Finally, CMS, like many school districts in metropolitan areas, faces the practical problem of a high turnover rate for teachers in economically- impoverished areas. *See supra* part II.B.2. CMS is trying to combat this trend by offering incentive pay to highly qualified teachers who agree to work in these areas. (Tr. 5/28 at 79 (Test. of Gwendolyn Bradford).)

The Court finds that prolonged supervision over teacher quality is unnecessary given that no such discrimination was ***272** found in *Swann,* the Court's order in *Swann* was precautionary and not remedial, the disparities in teacher competence are hard to define and difficult to measure, there are mitigating factors with the alleged disparities, there are practical problems in achieving and maintaining better results, and CMS appears committed to doing its best to improve teacher quality throughout the district.

b. Student Achievement

Because numerous external factors beyond the control of a school district affect educational outcomes, racial disparities in student test scores are generally not a bar to unitary status, and the authority of courts to require improvements in student achievement is very limited. *Jenkins III,* 515 U.S. at 101-02, 115 S.Ct. at 2055-56. As stated by the Supreme Court: "Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the [school district] will be able to operate on its own." *Id.; see City of Yonkers,* 181 F.3d 301, 316 ("As other

courts have recognized, using achievement test scores as a measure, either direct or indirect, of a school system's movement away from segregation is deeply problematic." (citing *Jenkins,* 515 U.S. at 101, 115 S.Ct. at 2055; *People Who Care v. Rockford Bd. of Educ.,* 111 F.3d 528, 537 (7th Cir.1997); *Coalition to Save Our Children,* 90 F.3d at 776-78)); *Keyes,* 902 F.Supp. at 1282 (" '[T]here is nothing in the law which does or could require equality in the results of educational services.... No school policy and no court order can assure any particular level of success in public schools any more than in any other aspect of life.'" (quoting *Keyes v. School Dist. No. 1,* 609 F.Supp. 1491, 1515, 1498 (D.Colo.1985))); *Flax,* 725 F.Supp. at 330 ("Poor achievement scores are often an incidence of poverty and family environment, matters not remediable by a school desegregation plan."), *aff'd,* 915 F.2d 155 (5th Cir.1990); *but see Jenkins v. Missouri,* 122 F.3d 588, 597-99 (8th Cir.1997) (affirming an order to partially remedy an achievement gap because the district court found that a portion of the gap was attributable to segregation).[41]

i. The Requirements of *Swann*

The issue of student achievement disparities was addressed during the early stages of *Swann,* when Judge McMillan observed a racial disparity in test scores and surmised that "segregation in Mecklenburg County has

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[41]In arguing that prolonged supervision is needed due to the achievement gap, the Swann Plaintiffs rely heavily on the Eighth Circuit's opinion in *Jenkins,* 122 F.3d 588. That opinion is puzzling considering that the Supreme Court had just reversed the Eighth Circuit on the issue of student achievement disparities, stating that, on remand, "the District Court should sharply limit, if not dispense with, its reliance on this factor." *Jenkins,* 515 U.S. at 101, 115 S.Ct. at 2055.

produced its inevitable results in the retarded educational achievement and capacity of segregated school children." 306 F.Supp. at 1296-97; *see Swann,* 300 F.Supp. at 1368-69; *Swann,* 318 F.Supp. at 791. While experts in *Swann* agreed that poverty and culture played a role in the underachievement of blacks, 300 F.Supp. at 1368-69, the Court did not conclusively identify the cause of the disparity. Stated the Court: "Until unlawful segregation is eliminated, it is idle to speculate whether some of this gap can be charged to racial differences or to 'socio-economic-cultural' lag." *Swann,* 306 F.Supp. at 1309.

The Court never ordered CMS to adopt specific academic programs to remedy the achievement gap but, rather, assumed that racial balance in schools would provide "hopeful relief." *Swann,* 306 F.Supp. at 1297. In fact, the Court found that CMS's academic programs and educational opportunities related to achievement were not discriminatory. *Swann,* 300 F.Supp. at 1367. With regard to the "individual evaluation of students," the Court stated:

> Individual students are evaluated annually in terms of achievement in particular subjects, and divided into groups for *273 the study of particular subjects in accordance with their achievement.... Few black students are in the advanced sections and most are in regular or slow sections. Assignments to sections are made by the various schools based not on race but on the achievement of the individual students in a particular subject. There is no legal reason why fast learners in a particular subject should not be allowed to move ahead and avoid boredom while slow learners are brought along at their own pace to avoid frustration. It

> is an educational rather than a legal matter to say whether this is done with the students all in one classroom or separated into groups.

Id. The Court similarly found that there was no discrimination in "elective courses." *Id.*

> Some elective courses such as German are offered at some but not all of the high schools. They are offered at a school only if enough students express a desire for the course. Not all schools therefore have all elective courses every year. This situation is not the result of discrimination on account of race.

Id. Thus, in terms of complying with the Court's orders, CMS's sole obligation with regard to the achievement gap was to eliminate segregated schools.

As set forth above, CMS has eliminated segregation in schools by achieving and maintaining a high level of racial balance in student assignment for many years. *see supra* part II.B.1. Nevertheless, anachievement gap remains. While test scores for black students have made significant improvements over time, and blacks in CMS have outperformed blacks statewide and nationwide,[42] the black-white achievement gap has remained relatively constant regardless of the year or type

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[42]As regards SAT scores, from 1987, "the first year that ethnic comparisons were available from the College Board," to 1997, blacks in CMS scored at or above the statewide average for blacks every year and scored above the national average for blacks every year from 1992 to 1996. PX 171 (CMS College Entrance Examination Board Results.) Meanwhile, whites in CMS scored above the statewide average for whites every year but only scored above the national average for whites in 1994. (*Id.*)

of test because white students have made progress as well. (PX 137 at 12 (Armor Rpt.); DX 7 Exs. D1-D3 (Peterkin Rebuttal Rpt.); PX 74 at CM098914, CM098916 (Student Assessment Measures); PX 171 (CMS College Entrance Examination Board Results).) What is more, the black-white achievement gap in CMS is comparable to the gap found in North Carolina and throughout the nation. (PX 137 at 12 (Armor Rpt.); PX 171 (CMS College Entrance Examination Board Results).)

Thus, contrary to the Court's prediction in 1969, the dramatic increase in racial balance throughout CMS did not result in a closure of the achievement gap. In fact, the maintenance of racially balanced schools appears to have no effect on test score disparities and seems to make little difference in the level of black achievement. (PX 137 at 1, 12, Charts 8-10 (Armor Rpt.); Tr. 4/28 at 131 (Test. of Dan Saltrick).) A comparison of End-of-Grade (EOG) test scores shows that blacks generally achieved the same results regardless of the racial composition of the school. (PX 137 at 12, Charts 9, 10 (Armor Rpt.); DX 10 at 7, App. C, Ex. 3; Tables 5b, 7b (Trent Rpt.).)

ii. CMS's Efforts to Close the Gap

The Court might end its inquiry there. Still, it is worth recapping some of CMS's efforts to address the gap. These efforts are best "characterized as general educational enrichments rather than remedies for prior segregation." *City of Yonkers*, 181 F.3d 301, 318 (citing *Swann*, 402 U.S. at 16, 91 S.Ct. at 1276).

In 1983, CMS began a minority achievement program to provide additional academic support for black children and

to increase black participation in the district's various academic programs. (Tr. 5/14 at 96-97 (Test. of may Howell).) At the time, *274 there was no similar program to this in North Carolina. (*Id.*, at 96.) During the 1980s, however, the state-of-the-art practices for achieving maximum academic performance were not well-developed, so progress was limited. (Tr. 5/3 at 59-60, 151-57 (Test. of Jeffrey Schiller).) By the early 1990s, such strategies were more sophisticated. (*Id.* at 151-57.) It was at that time that Dr. Murphy was hired as Superintendent of CMS with a primary goal of improving student test scores, particularly among black students. (Tr. 4/26 at 8-10 (Test. of John Murphy); Tr. 4/28 at 97-98 (Test. of Dan Saltrick).)

During Superintendent Murphy's tenure, CMS instituted numerous programs to enhance the academic achievement of students. He immediately eliminated "fluff courses" and implemented a more demanding uniform curriculum. (Tr. 4/26 at 23-24 (Test. of John Murphy).) CMS offered incentives to teachers and principals to improve test scores and tied bonuses specifically to increasing black participation in morechallenging courses. (*Id.* at 83-84, 118; Tr. 4/28 at 126-27, 166-68 (Test. of Dan Saltrick).) CMS "aggressively" recruited black students to enroll in Advanced Placement (AP) courses and in the rigorous International Baccalaureate (IB) program. (Tr. 4/26 at 80, 116 (Test. of John Murphy); *see* Tr. 4/28 at 197 (Test. of Dan Saltrick) ("[W]e almost killed ourselves trying to get students into those courses.").) CMS set up Learning Immersion programs and instituted Project Start, a grant-funded program, to train teachers to use new methods to identify a broader range of students as academically gifted. (PX 83 at 11 (State of the System Address, 1993).) In order to accelerate the preparedness of students to take these

more challenging courses, CMS provided tutors and support staff, extended school days, and instituted summer programs. (Tr. 4/26 at 88, 96 (Test. of John Murphy); Tr. 4/28 at 141-42 (Test. of Dan Saltrick).)

As a result of these efforts, CMS experienced a seven-fold increase in black enrollment in AP courses from 1991-92 to 1995-96. (PX 74 at CM098914 (Student Assessment Measures).) From 1992 to 1995, the percentage of blacks enrolled in higher level courses rose from 9.3% to 25.9%. (*Id.*) The number of AP course offerings also increased in schools with large black populations. For example, West Charlotte, one of only two imbalanced-black high schools operating last year, offered the second highest number of AP courses in the system. DX 36 (CMS Students in AP Courses); Tr. 6/14 at 158-62 (Test. of Susan Purser).

Meanwhile, CMS also did what it could to provide remedial education to those lagging the furthest behind. As stated above, CMS reduced the number of students in classrooms in predominately black schools so as to increase student-teacher interaction. *See supra* part II.B.7.a. Teachers also received special training to assist the most needy students. (Tr. 4/26 at 18-19 (Test. of John Murphy); (PX 83 at 18) (State of the System Address, 1993).) Having identified the connection of language skills with the black-white achievement gap, CMS created K-1-2 Literacy sites in elementary schools. (PX 83 at 18 (State of the System Address, 1993).)

CMS continues to implement more programs aimed at improving black achievement. Recently, CMS revised the process of identifying students as academically gifted and, as a result, has seen further increases in black enrollment in gifted

programs. (Tr. 6/14 at 49-50 (Test. of Susan Purser).) CMS started a large-scale pre-kindergarten program, Bright Beginnings, which was designed to enhance the academic achievement of educationally disadvantaged students at the earliest stages. (Tr. 4/20 at 46-47 (Test. of James Puckett).) Children in this program are screened for participation based upon educational needs, and, notably, 70% of the students participating are black. (*Id.* at 47, 49.) To increase the amount of educational resources in schools with large black populations, CMS started an Equity *275 Plus program. (Tr. 5/25 at 153-54 (Test. of Ron Dixon).) CMS also sought to increase parental involvement in these schools through its Comer Schools program. (*Id.* at 150-51.) Moreover, CMS continues to receive assistance from the State's ABC's program, which sends in remedial teams to overhaul low- performing schools. (*Id.* at 150.)

These enhanced educational opportunities aimed at black students have coincided with some notable improvements. From 1992 to 1994, CMS began to see a significantly greater percentage of blacks prepared for the next grade level than was seen in previous years. (PX 72 at CM084532 (Performance of Black Students).) During the 1994-95 school year, the gap between black and white students decreased in twenty-nine out of thirty-nine test subject categories. (PX 74 at CM098913 (Student Assessment Measures).) In eight of the ten remaining categories, blacks still showed progress, but the increase wasoffset by a greater increase for whites. (*Id.*) With focused efforts, these gap-narrowing trends continue today. (*See, e.g.*, Tr. 6/8 at 21, 31 (Test. of Eric Smith).)

iii. Experts' Explanations of the Gap

Expert witnesses attempted to explain the causes of the gap using regression analyses. Dr. Armor concluded that the gap "is not causally related to past or present student assignment and is mostly explained by socioeconomic factors over which CMS has no control." (PX 137 at 1 (Armor Rpt.).) He identified the racial differences in the four socioeconomic status (SES) measures that were available for elementary students in 1998: poverty, as measured by students receiving free lunch; parental education; family income; and family size. (*Id.* at 13, Chart 8.) Each of these SES factors were shown to have a statistically significant effect on student achievement. (*Id.* at 13, Appendix.)

The differences are revealing. The average black family income is $31,000, as compared to $59,000 for white families. (*Id.*) Only 15% of black parents have college degrees, whereas 58% of white parents do. (*Id.*) A large poverty gap is revealed, with 63% of black students receiving free lunch, as compared to 9% of white students. (*Id.*) Finally, 83% of white students have both parents at home, as compared to only 42% for black students, (*Id.*) These four SES factors alone, which do not represent the universe of known SES factors that impact achievement,[43] explain nearly 50% of the reading gap and over

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[43]Other important SES factors include the age of mother at birth, birth weight, child-rearing practices, parents' cognitive abilities, parents' occupational backgrounds, parental interest and involvement, and so on. (PX 137 at 13 (Armor Rpt.).) See City of Yonkers, 181 F.3d 301, 316-17. The evidence suggests that these other factors would be significant. A parental survey conducted by CMS at the start of the Murphy administration showed that black children, as compared to white children, generally were read to less, watched more television, and spent less time on homework.

40% of the math gap. (*Id.* at 14, Table 3.) When early test scores--the second grade is the earliest grade for which CMS has any test data--are added to the analysis to control for the skills children have close to the time they begin formal school training, nearly 80% of the reading gap and over 70% of the math gap are explained. (*Id.*) Dr. Armor testified that he likely could explain all of the existing gap if enough measures of SES and family background were available. (Tr. 4/29 at 129-31,229 (Test. of Dr. David Armor).)

*276 Dr. Trent, testifying for CMS, agreed that the largest reduction in the "race effect" occurs when one controls for SES factors. (Tr. 5/27 at 32- 39 (Test. of Dr. William Trent).) Nevertheless, he attempted to downplay the contribution of these factors by limiting the variables in his analysis. Dr. Trent only controlled for sex, free-or-reduced lunch status, and early test scores. (DX 10 App. C, Ex. 5, Tables 9-23 (Trent Rpt.).) While the free lunch variable is a useful standard-and an important one to use if available-it is a relatively crude proxy for SES that does not provide the whole story. (Tr. 6/21 at 153 (Test. of Dr. David Armor).) Free lunch status is nothing more than a single gross measure that distinguishes the poor from the non-poor according to a federal definition of poverty. (*Id.*) It does not account for the severity

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(Tr. 4/28 at 139-40 (Test. of Dan Saltrick).) Low parental expectations for black students also appeared to be a pervasive problem. (Tr. at 17-18 (Test. of John Murphy).) Additionally, in the most recent school year, roughly 40% of black children in kindergarten were previously identified in the Bright Beginnings program as educationally disadvantaged. (Tr. 4/20 at 45-50 (Test. of James Puckett).) Consequently, a large percentage of black children may lack the type of support system they need prior to entering the school system, and this can continue as those children go through the system.

of a family's poverty, and it does not differentiate between children of highly affluent parents and children of middle or working class parents. (*Id.*) Dr. Trent further restricted the SES effect when he controlled for early test scores. Rather than using second grade scores, which are the earliest available scores, Dr. Trent used data from either the third, fourth, fifth, or sixth grades. (DX 10 App. C, Ex. 5, Tables 9-23 (Trent Rpt.).) The use of these later test scores attenuates the ability to control for skills that children have before they enter the school system. (Tr. 6/21 at 154-55 (Test. of Dr. David Armor).) Also, he only controlled for the percentage of students who were at low mastery levels, as opposed to the full range of the variables. (*Id.* at 154.)

Despite the availability of data, Dr. Trent did not attempt to control for parental education, parental income, and other important SES variables that social scientists agree have a direct, cumulative impact on academic achievement. (*Id.*, at 153-54.) As stated in *Wessmann:* "[T]he requirement of considering various salient causal factors is part and parcel of a party's duty to limn a plausible causal relationship between particular independent and dependent variables." 160 F.3d at 805 n. 8 (citation omitted); *see also City of Yonkers,* 181 F.3d 301, 316 (rejecting a regression analysis that omitted several SES factors known to describe profound childhood influences). Because Dr. Trent restricted his consideration of crucial SES factors, the Court accords little or no weight to his regression analyses. *See Bazemore,* 478 U.S. at 400 & n. 10, 106 S.Ct. at 3009 & n. 10 ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.... There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant."); *Koger v. Reno,* 98 F.3d 631, 637 (D.C.Cir.1996) ("Courts have not ... understood *Bazemore* to

require acceptance of regressions from which clearly major variables have been omitted.").

Dr. Trent also argued that the achievement gap, or at least a portion thereof, is explained by "school climate," that is, the extent to which teachers in a given school have high expectations of and favorable attitudes toward their students. (DX 10 at 2, 7 (Trent Rpt.); Tr. 5/26 at 90 (Test. of Dr. William Trent).) Dr. Trent's methodologies and conclusions concerning school climate were sharply criticized and ultimately invalidated in *Wessmann*, 160 F.3d at 804-06. In *Wessmann*, the First Circuit stated:

> Dr. Trent's charge was to trace the causal relationship, if any, between teacher attitudes and poor student performance. His failure to obtain reliable data disabled him from taking even the first step, for he could not validly establish whether Boston teachers' attitudes in fact were discriminatory, let alone show that they caused (or even significantly contributed to) the achievement gap. This first step is a cornerstone of the entire research project; in its absence, Dr. Trent could not legitimately eliminate other variables (including societal discrimination) that might explain the achievement gap in the Boston public schools.... It follows inexorably that, with no methodological support, he *277 could not produce a meaningful analysis of causation and, accordingly, his conclusions cannot bear the weight of the School Committee's thesis.

Id. at 805 (citations omitted). The Court finds that Dr. Trent's climate study in the case at bar suffers from many of the same

defects.

Dr. Trent's analysis involved self-selected visits to twenty-five schools, interviews with various unnamed CMS employees, and reliance upon third-party survey data. (Tr. 5/26 at 22-23, 197-98 (Test. of Dr. William Trent).) The self-selection of visits to less than one-fifth of the district's schools suggests that his study may have been result-driven. These visits "lasted on average between 45 minutes to an hour," (DX 10 at 3 (Trent Rpt.)), and were conducted over the course of about six days. (Tr. 5/26 at 22 (Test. of Dr. William Trent).) The Court finds it incredible that a school can be labeled as having lower student expectations based upon such brief visits. This limited amount of time fails to grasp the multitude of factors that impact upon a daily interaction between teachers and students and fails to do so in a way that permits system-wide inferences.

In addition, the survey information relied on by Dr. Trent is suspect. These data consisted of voluntary responses to a question from a CMS teacher survey conducted in three separate school years. Notably, the question was not worded the same every year. In the 1995-96 and 1996-97 school years, the question asked whether students of all races and backgrounds got along well at that school. (DX 10 App. C, Ex. 4, Table 8 (Trent Rpt.).) This question cannot be a reliable measure of teacher attitudes because the responses said nothing about how the faculty or administration was treating students; it only asked how students treated each other. (Tr. 5/27 at 41-42 (Test. of Dr. William Trent); Tr. 6/21 at 157 (Test. of Dr. David Armor).) The survey question from the 1997-98 school year ambiguously asked whether students were treated fairly regardless of "cultural" background. (DX 10 App. C, Ex.

4, Table 8 (Trent Rpt.).) This question is problematic because "culture" is a much broader concept than "race" and can be interpreted differently. (*Id.;* Tr. 5/26 at I 85-86 (Test. of Dr. William Trent); Tr. 6/21 at 157 (Test. of Dr. David Armor).) Also, the question does not distinguish between the treatment of blacks, whites, Hispanics, Asians, or others, so it is an unreliable indicator for racial discrimination against blacks. (Tr. 6/21 at 157-58 (Test. of Dr. David Armor).)

The survey questions relied upon by Dr. Trent do not provide--and, apparently, were not designed to provide-an accurate measure of teacher attitudes and expectations. (*Id.* at 156.) Furthermore, Dr. Trent conceded that he made no effort to validate the survey data. (Tr. 5/26 at 203 (Test. of Dr. William Trent).) Assuming *arguendo* that the survey responses are an accurate measure of student treatment, a school-by-school comparison of these data indicates a high level of fair treatment regardless of the racial composition of the school. (PX 137 (Armor Rebuttal Rpt.); Tr. 6/21 at 158-59 (Test. of Dr. David Armor).) In fact, the percentage of teachers who agree that students are treated fairly is as great or greater in schools with the highest percentage of black students than in schools that are racially balanced or imbalanced-white. (PX 137 (Armor Rebuttal Rpt.); Tr. 6/21 at 158-59 (Test. of Dr. David Armor).) Thus, the evidence would show, once again, that racial balance in student assignment is a factor not directly related to academic achievement.

Perhaps the most serious deficiency in Dr. Trent's analysis is that he did not attempt to show that the alleged differences in teacher expectations were attitudinal remnants of the segregation era. (Tr. 5/26 at 179 (Test. of Dr. William Trent).) Given that the vast majority of teachers in CMS came

to the system in the post-segregation era, it would appear unlikely that any such differences could be traced to the dual system. In the end, ***278** even if it could be demonstrated scientifically that teachers in CMS have lower expectations for black students, the Court would be hard-pressed to fashion and enforce a remedy. Requiring that teachers raise their expectations or that students get along is not the type of "real and tangible relief" that courts can provide. *Freeman,* 503 U.S. at 493, 112 S.Ct. at 1447.

Dr. Rosalyn Mickelson, another CMS expert, similarly testified that the system deprives blacks of educational opportunities. The Plaintiff-Intervenors raised several credibility concerns with her testimony.[44] Even leaving these concerns aside, much of Dr. Mickelson's report was rendered useless because she relied on a seriously flawed data matrix.

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[44]Dr. Mickelson failed to candidly disclose the terms of compensation for her services. (Tr. 6/15 at 106-12, 120-22 (Test. of Dr. Rosalyn Mickelson.) Fed. R. Civ. P. 26(a)(2)(B). In addition, she has had a long-standing relationship with CMS in "a number of capacities," including co-authoring the "Pupil Assignment Subcommittee Report" for the Committee of 25, a group assembled by CMS to examine school policies. (Tr. 6/15 at 122 (Test of Dr. Rosalyn Mickelson)); DX 128 (Committee of 25 Pupil Assignment Rpt.) The reforms advocated in that report are similar to the reforms she advocates in this case. Finally, the language and format of Dr. Mickelson's report suggested that her work was not wholly independent and original. She insisted that, prior to filing her report, she never had any contact with Dr. Trent, who offered conclusions that were overlapping in subject matter. (Tr. 6/15 at 97-106 (Test. of Dr. Rosalyn Mickelson).) Yet, the introduction and point headings in her report showed a strikingly verbatim similarity with Dr. Trent's report. (*Compare* DX 8 (Mickelson Rpt,) *with* DX 10 (Trent Rpt.).) Dr. Mickelson emphatically stated that all of the language in her report was her own and could offer no simple explanation for the resemblance. (Tr. 6/15 at 113-17 (Test of Dr. Rosalyn Mickelson).)

(Tr. 6/17 at 3-12 (Stipulation by counsel and Test. of Dr. Rosalyn Mickelson).) In identifying schools that were racially imbalanced, she counted *minority* student enrollment rather than *black* student enrollment. (Id. at 6.) The effect of using minority enrollment almost invariably misstated the alleged black enrollment and caused many racially balanced schools to be incorrectly labeled as racially identifiable (*Id.* at 3-12.) After considerable debate over the discrepancies, the Court directed Dr. Mickelson to double-check her numbers overnight. (Tr. 6/16 at 121-74 (Test. of Dr. Rosalyn Mickelson).) The next day, she admitted that her data were wrong, and she withdrew her regression analysis to the extent that it attempted to link lower achievement with attending an imbalanced-black school. (Tr. 6/17 at 10 (Test. of Dr. Rosalyn Mickelson).)

Most troubling was the great length Dr. Mickelson went to deny an obvious error. She repeatedly sought to explain, under oath, that any discrepancies between her data and CMS's official enrollment figures were due to head counts being taken at different stages of the school year. (*Id.* at 127, 136-37, 161-62.) She stuck by this explanation even though, in some schools, it meant that the racial balance would have fluctuated by as much as 20% within a period of a few days, weeks, or months. (*Id.* at 128, 162.) The Court finds that her willingness to prop up baseless excuses in an effort to cover up her errors raises serious doubts about her scientific objectivity and creates suspicions as to the rest of her report. *See Holm v, United States,* 325 F.2d 44, 46- 47 (9th Cir.1963) (holding that the fact-finder may disregard all of an expert's testimony or consider it weakened if the expert contradicts himself or is impeached).

In any event, the remainder of her report was irrelevant. She blamed the achievement gap on CMS's "hierarchically differentiated system of instructional delivery, commonly known as 'tracking.' " (DX 8 at 7 (Mickelson Rpt.).) She overlooked that, in *Swann* the Court explicitly approved of the ability grouping of students. 300 F.Supp. at 1367. Furthermore, even though 'in-school segregation' may result from this practice, as a matter of law, it is regarded as a legitimate means of educating *279 children. As Chief Judge Posner recently wrote in a Seventh Circuit opinion:

> Tracking is a controversial educational policy, although just grouping students by age, something no one questions, is a form of 'tracking.' Lawyers and judges are not competent to resolve the controversy. The conceit that they are belongs to a myth of the legal profession's omnicompetence that was exploded long ago. To abolish tracking is to say to bright kids, whether white or black, that they have to go at a slower pace than they're capable of; it is to say to the parents of the brighter kids that their children don't really belong in the public school system; and it is to say to the slower kids, of whatever race, that they may have difficulty keeping up, because the brighter kids may force the pace of the class.... [A]s the consensus of the nation's educational authorities, [tracking] deserves some consideration by a federal court.

People Who Care, 111 F.3d at 536. Moreover, Dr. Mickelson conceded that CMS has flexibility in its 'tracking' practices. (Tr. 6/16 at 84-85 (Test. of Dr. Rosalyn Mickelson).) Placement in courses is due in part to choice, with choices structured and channeled based on prerequisites and prior

achievement. (*Id.*) Additionally, CMS allows parents to challenge their child's designation. (*Id.*)

Dr. Mickelson's assumption that CMS was discriminating against blacks in the assignment of students to academically gifted programs and special education programs also was flawed because she was not aware of the assignment criteria used by CMS. (*Id.* at 11-12.) In fact, assignments to these programs involve the use of government standards. (*Id.* at 16.) Furthermore, the assignment processes are inherently fair because parents may have their children tested independently of the school system to determine whether they are academically gifted, (*id.* at 14), and CMS provides meaningful appellate procedures when students are assigned to special education programs. (*Id.* at 17; Tr. 5/19 at 132-35 (Test. of Calvin Wallace).)

As to Dr. Mickelson's conclusion that the Court should order CMS to undertake further reforms, the Court notes that her prior research tends to undermine her recommendation. In an article published in 1990, she claimed that black students' attitudes and beliefs regarding the value of long-term educational benefits were significantly different than for whites. (PX 219) (R.A. Mickelson, *The Attitude-Achievement Paradox Among Black Adolescents,* 63 Soc. Educ. 44 (1990).) This difference, she wrote, manifested itself in lower black achievement. (*Id.* at 45.) Her article concluded: "Without fundamental change in the larger opportunity structure, the underachievement of minority and working-class students is likely to persist even in the face of the best-designed and most lavishly funded educational reforms." (*Id.* at 60.) As stated throughout equal protection case law, it is beyond the proper purpose of a desegregation decree to remedy societal

discrimination. *Swann*, 402 U.S. at 22-23, 91 S.Ct. at 1279. Thus, her article indicates that the type of court-ordered remedy she envisions would be either improper or futile.

Like Drs. Trent and Mickelson, CMS expert Dr. Peterkin asserted that low teacher expectations and inadequate educational opportunities were the cause of underachievement for blacks. (DX 6 at 3 (Peterkin Rpt.).) He conducted no regression analysis to substantiate this. (Tr. 6/17 at 216, 223 (Test. of Dr. Robert Peterkin).) His report on student achievement was largely a compilation of statistics without any analysis demonstrating a causal relationship between current racial disparities and any past or present discrimination. (*Id.* at 216-27.) Similarly, Dr. Stevens, the Swann Plaintiffs' expert, did nothing more than compile raw statistics to show that blacks were underrepresented in gifted programs and overrepresented in learning disability programs. (SX 2 at 23-27 (Stevens Rpt.).) As recognized in *Wessmann*, "*280 it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena." 160 F.3d at 804. "[I]f such statistics axe to be at all probative of discrimination, they must link cause and effect variables in a manner which would permit such an inference." *Id.*

In asserting that black students were denied access to advanced classes, Dr. Peterkin completely ignored the great efforts of CMS to recruit black students to take AP courses, *see supra*, and he overlooked the fact that AP courses are open to any students who have taken the prerequisite classes. (Tr. 6/18 at 36 (Test. of Dr. Robert Peterkin).) He conceded that he had conducted no study to determine the rate of black students' interest in taking these courses. (*Id.* at 38-39.) Without some

empirical basis for finding similar rates of interest among black and white students in classes that are equally open to students, there is no rational way to infer lack of access from disparities in enrollment.

Though he opined extensively on teacher expectations, Dr. Peterkin conducted no interviews with teachers and conducted no teacher surveys. (*Id.* at 72- 73.) He based his conclusions on interviews he conducted with CMS central and building administrators and on a series often-minute visits to various classrooms in self-selected schools. (*Id.* at 80-81; DX 6 at 3 (Peterkin Rpt.).) These subjective impressions are entitled to little or no weight. *Wessmann.* 160 F.3d at 806-07.

Finally, the Court notes that Dr. Peterkin was a school board witness in the *Jacksonville NAACP* case, *supra.* where he testified that, based on a comparison to the national achievement gap, the achievement gap in Duval County, Florida, was not a vestige of past discrimination. "I find these conditions in school systems throughout the nation," he stated, adding that " [i]t's one of those vexing problems in public education that we have struggled with," and "I wish I had the answers to why it persists in so many districts across this nation." (Tr. 6/18 at 70-71 (Test. of Dr. Robert Peterkin) (reading transcript from *Jacksonville NAACP).*) Based on the similarity of facts recited in *Jacksonville NAACP, supra* slip op. at 96-109, 139, the Court finds it disconcerting that Dr. Peterkin could reach the exact opposite conclusion about the achievement gap in Charlotte.

When Judge McMillan observed the test score disparities in 1969, he acknowledged that the measure of a school system moving away from segregation is not dependent

upon student achievement, stating: "Segregation would not become lawful, however, if all children scored equally on the tests." *Swann,* 318 F.Supp. at 794 (emphasis deleted). Thirty years later, the Court finds no credible evidence that the "longstanding and seemingly intractable disparities" in student achievement are caused by discriminatory practices of CMS, past or present. *Keyes,* 902 F.Supp. at 1300. Instead, the evidence has shown that CMS is an innovative school system. It has implemented a number of programs to enhance the academic success of all students, black and white.

There always will be something more that CMS can do to improve the academic performance of black students, and it is encouraging that CMS believes that it can close the achievement gap, regardless of whether the system is under supervision. (Tr. 6/14 at 90-91 (Test. of Susan Purser).) Of course, the school system, not the Court, is best-equipped to take on this challenge. *See Keyes,* 902 F.Supp. at 1307 ("[C]ourts using the adversary system were not designed to accomplish institutional reform."); *id.* at 1281-82 ("[E]ducational policy is to be determined through the democratic process.").

In sum, most of the existing achievement gap is explained by available socioeconomic measures. As to the portion of the gap that may or may not be explained by socioeconomics, the Court cannot find ***281** that this is related to any discriminatory practice by CMS and cannot identify a cause for which the Court can order a realistic and practical injunction. Therefore, the Court will not delay the finding of unitary status due to racial disparities in student achievement.

c. Student Discipline

In *Swann,* the Court never made findings and never entered any remedial orders regarding student discipline. The Swann Plaintiffs raise the issue now, however, asserting that black students are overrepresented in disciplinary matters. Their expert, Dr. Stevens, who has no expertise in the area of student disciplinary procedure, (Tr. 5/12 at 49 (Test. of Dr. Leonard Stevens)), pointed out that "Black pupils in the District are disciplined at rates disproportionate to their presence in the schools." (SX 2 at 27-30 (Stevens Rpt.).) Likewise, CMS accused itself of discrimination. Dr. Peterkin pointed out that, of the 13,206 students disciplined during school years 1995-96 through 1997-98, 66.3% were black and 33.7% were white. (DX 6 Ex. 6a (Peterkin Rpt.).)

Of course, this disparity does not, by itself, constitute discrimination; rather, it is probably due to a disproportionate incidence of infractions committed by black students. This is the most likely explanation given that CMS has a uniform, race-neutral policy of discipline, which, CMS officials say, is applied to all students fairly. (Tr. 5/19 at 137-41 (Test. of Calvin Wallace); Tr. 5/28 at 133-34 (Test. of Ron Thompson).) Notably, any student who is charged with a violation has the right to an appeal and may assert that the charge was due to racial bias. (Tr. 5/19 at 138-41 (Test. of Calvin Wallace).) Regional Assistant Superintendent Calvin Wallace, a long-standing employee of CMS who has been responsible for developing disciplinary guidelines, testified that he was unaware of any students alleging that race played a role in their being punished for a violation. (*Id.* at 141.)

Despite CMS's uniform guidelines, Dr. Peterkin argued that blacks are more likely to face severer penalties than whites who commit the same offense. (DX 6 at 8, Ex. 6c (Peterkin Rpt.); DX 7 7-8, Exs. H 1-1423 (Peterkin Rebuttal Rpt.).) The evidence did not necessarily show this, however. From 1995-96 to 1997-98, blacks accounted for 62% of in-school suspensions and 66% of out-of-school suspensions. These ratios almost exactly mirror the overall suspension rate for blacks, which, as stated above, was 66.3%. (*Compare id.*, Ex. 6a *with id.* Ex. 6c.) The only apparent disproportionality is with the assignment of blacks to management schools. Of the eighty-four students assigned to these schools from 1995-96 to 1997-98, sixty-eight (81%) were black, whereas sixteen (19%) were white. (*Id.* Ex. 6c.) Given that a total of 13,206 students were disciplined during these three years, (*id.* Ex. 6a), it is difficult to conclude that a disparity among eighty-four students constitutes discrimination. Furthermore, the discipline imposed in each case will differ based upon the individual facts and circumstances. A student might be subject to severer penalties, even when the same offense is at issue, due to the egregiousness of the student's conduct or because of a history of repeated offenses. Dr. Peterkin's analysis did not account for these factors. (Tr. 6/18 at 55-67 (Test. of Dr. Robert Peterkin).)

There is little that the Court could do or should do to change the racial disparity in student discipline. As Chief Judge Posner stated: "Racial disciplinary quotas violate equity in its root sense. They entail either systematically overpunishing the innocent or systematically underpunishing the guilty. They place race at war with justice. They teach school children an unedifying lesson of racial entitlements." *People Who Care*, 111 F.3d at 538.

The Court finds that any disparities that exist in the area of discipline are not causally related to the dual system. Given that CMS accuses itself for the disparity, it is *282 clear that the district is sensitive to the issue. Most importantly, CMS has even-handed disciplinary procedures, and it is expected that students will be disciplined regardless of the effect on racial statistics. The Court therefore will not prolong supervision over CMS due to racial disparities in disciplinary matters.

8. Good Faith

In determining whether a school board has shown a good faith commitment to a desegregation plan, a district court must consider whether the school board's policies "form a consistent pattern of lawful conduct directed to eliminating earlier violations." *Freeman,* 503 U.S. at 491, 112 S.Ct. at 1446; *see Lockett v. Board of Educ.,* 111 F.3d 839, 843-44 (11th Cir.), *reh'g denied,* 121 F.3d 724 (11th Cir.1997). Without reservation, the Court finds that CMS has demonstrated a good faith commitment to complying with the *Swann* desegregation orders and that there is no concern that CMS will return to an unlawfully segregated school system. The Court bases this conclusion on several findings.

First, since the final order was entered in *Swann* in 1975, the Swann Plaintiffs have never filed a motion for further relief, *see Jenkins v. Missouri,* 967 F.2d 1248, 1251 (8th Cir.1992) ("Monitoring implementation of the remedy is a crucial part of the plaintiffs' function in these cases."), and the Court has never had to enjoin or sanction CMS for noncompliance. In fact, the only sanctions imposed on CMS have been in the current *Capacchione* litigation, where CMS, in its overzealous attempt to keep the desegregation order in

place, refused to produce relevant documents in an appropriate manner and improperly concealed the identity of its trial witnesses. (*See* Order of 4123/99 (sanctioning CMS for non-disclosure of trial witnesses); *see also* Order of 9/16/98 (ordering CMS to produce documents and warning that sanctions may be imposed); Order of 10/7/98 (observing CMS's lack of cooperation in releasing information); Order of 11/23/98 (noting that CMS's pretrial tactics were causing "unnecessary obstruction and delay").)

Second, CMS has taken actions that have gone above and beyond what the Court's orders required. To cite just a few examples, CMS has continued to adjust student attendance zones when schools fell out of racial balance, even though imbalances were due to private choices and countervailing demographic forces. *See supra* part II.B.1. CMS also implemented and expanded a magnet school program, which has helped to achieve racial balance in schools where such balance otherwise had been difficult to attain.[45] *See supra* parts I.B and II.B.1. In addition, CMS instituted a minority achievement program, a pre- kindergarten program, and other measures to address concerns over the achievement gap. *See supra* part II.B.7.b.ii. In a similar vein, the school board has attempted to recruit more black teachers so as to provide more minority role models. *See supra* part I1.B.2. While no remedial actions were required in facilities, CMS nevertheless adopted baseline standards to improve the quality of all its facilities. *See supra* part II.B.3. Many other examples undoubtedly exist, but the Court was unlikely to hear any of

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[45]In fact, CMS went too far in trying to achieve racial balance in its magnet schools by imposing a prescribed admissions quota that was too inflexible. *See infra* part II.C.

them from CMS, whose stance in the case was such that it offered no self-congratulatory evidence and strongly objected to anything that shed favorable light on the school system. (*See, e.g.* Tr. 5/27 at 116 (objection by CMS to document references indicating that black students in CMS had outperformed blacks nationally on the SAT).)

Third, CMS regularly sought input from the community on its desegregation efforts. In addition to regular school board meetings held in a public forum, CMS established various citizen advisory committees--*283 such as the Citizens Advisory Group, the Committee of 16, the Committee of 25, the Committee of 33, and the Future School Planning Task Force--to provide suggestions and feedback on school policy. Regardless of whether CMS ultimately adopted specific committee proposals, the board demonstrated its accessibility and openness to criticism and its desire to build community support for integration.

Fourth, CMS routinely reaffirmed its commitment to integration. On September 10, 1991, CMS declared its ambition to be "the premier urban, integrated system in the nation" and incorporated this proclamation into its mission statement. (*See* PX 44 at CM035773 ("Student Assignment Plan: A New Generation of Excellence").) This mission statement has become CMS's mantra. (*See id.;* PX 104 at CM047928 (CMS Facilities Master Plan); PX 30 at CM207953 (CMS Resolution adopted 2/11/92); PX 2 at CM100533 (CMS Resolution adopted 4/12/94).) CMS even passed resolutions supporting integration policies that went beyond the school board's authority. For example, on February 11, 1992, the board unanimously adopted a resolution that advocated the building of "low-moderate income housing"

throughout the county. (DX 89 at 6 & attach. (CMS Board Minutes of 2/11/92); Tr. 6/21 at 95-96 (Test. of Arthur Griffin).) On April 12, 1994, the board further resolved to "convene an affordable housing policy task force" to evaluate and recommend housing policy initiatives that promote integrated communities. (PX 2 (CMS Resolution adopted 4/12/94).)

Fifth, blacks have maintained a significant presence on the school board. Currently, four of the nine school board members are black, including the board chairman, Arthur Griffin. (Tr. 6/18 at 72 (Test. of Arthur Griffin).) *Accord Morgan v. Nucci,* 831 F.2d 313, 321 (1st Cir.1987) ("Minority presence in the power structure is a factor that might be expected to help prevent regression to a dual system once the court's presence is withdrawn."); *Riddick,* 784 F.2d at 528 (noting that the racial integration of Norfolk's school board made discrimination unlikely). Moreover, white members of the board have consistently voted with black members on policy issues pertaining to integration. (Tr. 4/22 at 19 (Test. of Sharon Bynum).)

Sixth, there has been no evidence of racial animus or discriminatory intent in any school board actions during the thirty years that CMS has been under court order. Even when the Court scolded the board for dragging its feet at the early stages of *Swann,* the Court never questioned "the motives or the judgment of the School Board members." *See Swann,* 300 F.Supp. at 1372. Eventually, the board began to actively support the Court's desegregation plan, and the Court closed the *Swann,* case in 1975, expressing its confidence that the board would remain committed to the plan. *Swann,* 67 F.R.D. at 649-50. One former school board member, who served with

some fifteen to twenty board members from 1986 to 1996, stated that every board member she ever worked with was committed to complying with the desegregation order. (Tr. 4/22 at 19 (Test. of Sharon Bynum).) Despite its self-accusatory position in this case, CMS stipulated that, while under court order, it never "acted with 'a racially segregative purpose.'" (Pl.'s Mem. Supp. Mot. Compel filed 8/17/98, Ex. B (CMS's Resp. Interrogs. at 11, no. 11).)

Seventh, while the goal of perfect compliance with court orders has remained elusive, no evidence has been presented that school authorities were guilty of easily correctable errors. Rather, school board members generally testified about the difficulties of reassigning students and building new facilities. (*See, e.g.,* Tr. 4/22 at 51 (Test. of Sharon Bynum).)

These findings are consistent with observations made by Dr. Stolee, the education consultant hired in 1991 to evaluate *284 and revise CMS's student assignment plan. Stated Dr. Stolee:

> For the last twenty years, the Charlotte-Mecklenberg Board of Education and the Charlotte-Mecklenburg community have, in good faith, complied with the orders of the court.... [A]ll desegregated. Each year adjustments have been made to the pupil assignment plan in order to keep schools "in balance." This task has been complicated by the population growth in the Charlotte-Mecklenburg area, with the concomitant need to build new schools.

> It must be said that the Charlotte-Mecklenburg Board and community have a great deal of pride in the fact that they successfully met a challenge and made the solution work. Schools in other parts of the nation have looked to Charlotte-Mecklenburg as an exemplar.
>
> The pride felt and the national respect are well deserved.

(DX 108 at 1-2 (Stolee Plan).)

There can be no serious contention that CMS has been uncommitted to the *Swann* desegregation orders. Arguments to the contrary are wholly unconvincing. One CMS official's unsubstantiated fear that discrimination might reappear in the absence of a court order[46] is no grounds for prolonging court

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[46]Associate Superintendent Purser expressed such fear in her cross-examination:

> Q. But you think that if suddenly the Court declares the school system unitary, that all of those things that you have done are going to drop off, is that what you are telling this Judge?
>
> A. Yes, I think there would be a difference....
>
> . . . . .
>
> Q. So, ma'am, this school system's commitment to enhancing the educational opportunities of black students and increasing their academic achievement is something that this administration and this School Board is going to make sure happens regardless of what happens in this case, isn't it?
>
> A. Yes, this School Board will in fact be focused. But again, the School Board will change, superintendents will change, the people involved in this organization will change.

supervision. *Singleton v. Jackson Mun. Separate School Dist.*, 541 F. Supp. 904, 914 (S.D.Miss.1981). Similarly, isolated incidents of racial insensitivity that never were condoned by CMS cannot be a basis for denying unitary status.[47] In fact, the evidence consistently showed that persons involved in such incidents were investigated, reprimanded, suspended, or even fired. (*See, e.g.*, Tr. 5/25 at 192-93, 217-19 (Test. of Teresa Cockerham); Tr. 5/28 at 94-96, 109-10 (Test. of Ron Thompson); Tr. 6/8 at 41-43 (Test. of Eric Smith); Tr. 6/18 at 169-70 (Test. of Arthur Griffin).)

The Court finds that CMS has eliminated the vestiges of past discrimination to the extent practicable and has complied with the Court's orders in good faith for almost thirty years. It is totally unforeseeable that CMS would return to an intentionally-segregative system. Accordingly, the Court declares that CMS has achieved unitary status in all respects and thereby vacates and dissolves all prior injunctive orders from *Swann*.

Q. But you don't know what any future School Board or administration will do either way, do you?

A. That's exactly my point.
(Tr. 6/14 at 98-101 (Test. of Susan Purser).)

[47]While the law of employment discrimination under Title VII is inapplicable to this case, an instructive principle from that context is that no racially discriminatory intent can be established by "stray remarks and isolated statements by those unconnected to the final decision-making process." *See Bodoy v. North Arundel Hosp.*, 945 F.Supp. 890, 895 (D.Md.1996), *aff'd*, 112 F.3d 508 (4th Cir.1997).

H. Constitutional Injuries

It is important to remember that the current litigation started not as a petition for unitary status but as a discrimination suit arising out of Cristina Capacchione's denial of admission to a magnet school based on her race. CMS responded that it was required to use racial criteria in the ***285** school's admissions program based on the *Swann* desegregation orders. As such, CMS argues that it cannot be held liable for actions taken pursuant to a court order. CMS further argues that its race-based policies are constitutionally permissible under the theory that achieving diversity is a compelling state interest. The Plaintiff-Intervenors counter that CMS cannot use the *Swann* orders as a defense because the system has been *de facto* unitary for years. Additionally, the Plaintiff-Intervenors argue that various race-based policies instituted by CMS are unconstitutional because they are not narrowly tailored.

1. Immunity under the *Swann* Orders

Public officials acting pursuant to court directives are immune from liability for damages in a suit challenging the prescribed conduct. *Wolfe v. City of Pittsburgh,* 140 F.3d 236, 240 (3d Cir.1998). Up until this ruling, CMS was still under court order. The Court finds no legal basis for a finding of *de facto* unitary status that would abrogate CMS's immunity retroactively. In other words, the termination of court supervision today cannot "relate back" to an earlier time. The relinquishment of court supervision in a desegregation case must be clear and unambiguous. *Dowell,* 498 U.S. at 246, 111 S.Ct. at 636. As stated in *Dowell:* "[A] school board is entitled to a rather precise statement of its obligations under a

desegregation decree. If such a decree is to be terminated or dissolved, ... the school board [is] entitled to a like statement from the court." *Id.* (citing *Spangler,* 427 U.S. 424, 96 S.Ct. 2697). Here even though the *Swann* case was closed in 1975 and remained inactive for over twenty years, jurisdiction was expressly retained, *Swann,* 67 *F.R.D.* at 649; *Martin,* 475 F.Supp. at 1341, and CMS continued to act as if it were under court order. Consequently, CMS enjoys immunity from liability for any actions it took consistent with the Court's injunction.

This immunity has limits, however. CMS cannot enjoy immunity for *ultra vires* acts--that is, acts that are beyond the scope of the Court's mandate and that are not otherwise constitutionally authorized. As discussed above, the Supreme Court's decision in *Swann* recognized the limits of how race could be considered in crafting a desegregation order. *See supra* part II.A. In addition, the development of equal protection jurisprudence since *Swann* has further crystallized the limitations to which state actors must adhere when enacting race-based remedial policies. *See supra* part II.A. Thus, contrary to CMS's position in this case, the *Swann* desegregation order was not a license to pervade every aspect of school operations with an ever-expansive array of race-based policies. *See People Who Care,* 111 F.3d at 534 ("[A desegregation] remedy must be tailored to the violation, rather than the violation being a pretext for the remedy. Violations of law must be dealt with firmly, but not used to launch ... ambitious schemes of social engineering.").

Given the potential misuse of race-conscious remedies and the plausible inadequacies of injunctive relief, it is conceivable that certain school board actions could open the door to liability for legal damages. For instance, involuntary

busing that is so unreasonably long that it jeopardizes the health, safety, or educational experience of schoolchildren (of any race), coupled with a school system's refusal to make reasonable accommodations or provide reasonable alternatives, is the sort of unauthorized act that, in the most extreme cases, could give rise to liability. *See Swann,* 402 U.S. at 30-31, 91 S.Ct. at 1283 ("An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."); *see also* ***286***Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 492 n. 6, 102 S.Ct. 3187, 3206 n. 6, 73 L.Ed.2d 896 (1982) (Powell, J., dissenting) ("Extensive pupil transportation may threaten liberty or privacy interests." (citations omitted)); cf. 20 U.S.C. § 1714 (1999) (prohibiting busing when it adversely affects students' health and educational experience). The evidence did not present such a situation here.

An area of liability that is, however, at issue in this case is the use of rigid racial quotas. One of the most basic tenets underlying *Swann* was that the use of mathematical ratios in desegregation plans could be used as a "starting point" but could not be used as an "inflexible requirement." *Swann,* 402 U.S. at 25, 91 S.Ct. at 1280. Of course, if Judge McMillan had mandated the use of inflexible quotas, CMS could not be held liable, even though the Court's order would have been unconstitutional. *See Turney v. O'Toole,* 898 F.2d 1470, 1472-73 (10th Cir.1990) ("[O]fficials charged with the duty of executing a facially valid court order enjoy absolute immunity from liability for damages in a suit challenging conduct prescribed in that order. .... 'Facially valid' does not mean 'lawful.' An erroneous order can be valid." (citations and brackets omitted)). Judge McMillan, however, firmly rejected

the use of rigid racial quotas, *see Swann*, 306 F.Supp. at 1312 ("Fixed ratios of pupils in particular schools will not be set."), and always allowed for flexibility in the use of racial balancing goals. *See, e.g., Swann*, 311 F.Supp. at 268 (stating that "variations from [the] norm may be unavoidable" and crafting guidelines with elastic terms, such as "approximately" and "about the same proportion"). CMS ran the risk of exposure to liability when, in instituting its magnet program without seeking judicial approval, it implemented a new regime of rigid race-based assignment procedures.

A school board that is under a desegregation order is not barred from ever modifying a desegregation plan, but, prior to making substantial changes, the board is expected to seek approval from the supervising court. *Riddick*, 784 F.2d at 535. Thus, in *Swann* the Court left "maximum discretion in the Board to choose methods that will accomplish the required results"[48] but the Court also "directed that leave of court be obtained before making any material departure from any specific requirement." 311 F.Supp. at 270. Dr. Stolee recognized this obligation when he drafted the proposed magnet plan in 1992. (DX 108 at 9 (Stolee Plan).) Of the forty-four recommendations he made to CMS in that plan, "RECOMMENDATION # 1" read: "THE SCHOOL BOARD, THROUGH LEGAL COUNSEL, SHOULD APPROACH THE FEDERAL COURT TO SECURE APPROVAL TO CHANGE

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[48]Just because the Court gave CMS "maximum discretion" does not mean that the Court should allow an abuse of discretion. "[T]he *Brown* Court made it abundantly clear that constitutional principles cannot take a back seat to the discretion of local school officials in respect to matters such as the racial composition of student bodies." *Wessmann*, 160 F.3d at 797 n. 3.

THE COURT-ORDERED DESEGREGATION PLAN." (*Id.* at 9,606-8 (caps in original).) The board ignored this advice.

CMS now maintains that magnets schools are permissible under the existing *Swann* orders and, particularly, under the provision for "optional schools" in the 1974 CAG Plan. 379 F.Supp. at 1104. The Court acknowledges that a magnet school can be an acceptable desegregation tool. *See, e.g., Milliken,* 433 U.S. at 272, 97 S.Ct. at 2753. The Court also acknowledges that the optional schools of the 1970s, similar to today's magnet schools, involved countywide open enrollment and a racial balancing target. *Id.* Nonetheless, the way that CMS's magnet program uses race in its admissions process is significantly different from any assignment policy ordered or approved of in *Swann.*[49] ***287** This change in the student assignment process was a material departure from the *Swann* orders. Ultimately, however, what is important is not whether CMS departed from the desegregation order, but whether CMS departed from the order in a way that harmed someone's rights. *Cf. Dowell,* 498 U.S. at 249-50 n. 1, 111 S.Ct. at 638 n.l.

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[49]Furthermore, magnets differ from optional schools in that magnets offer specialized curricula and thereby convey to a subset of students a benefit above and beyond the regular academic program. (*See* PX 43 (CMS Magnet Options 1998-99).) in this way, the case at bar is distinguishable from the 1979 *Martin* case. *See supra* part I.B. In *Martin,* the Court rejected a challenge based on *Bakke* to CMS's race- conscious reassignment of students because, under that reassignment, all students were guaranteed admission into schools of equal quality; the question was simply where. *Martin,* 475 F.Supp. at 1321. Here, the magnet school program, as advertised by CMS, provides special benefits. (PX 43 (CMS Magnet Options 1998-99).) Thus, contrary to the situation in *Martin* students are being denied "opportunities or benefits enjoyed by others solely because of [ ] race." *Bakke,* 438 U.S. at 305, 98 S.Ct. at 2756.

2. The Magnet School Admissions Policy

CMS's magnet school admissions policy has never been subject to judicial review or approval. The use of racial criteria in this process is constitutionally suspect, so the Court reviews the admissions policy under a strict scrutiny analysis. *See Adarand,* 515 U.S. at 215-16, 115 S.Ct. at 2107 (holding that strict scrutiny applies to all racial classifications). This analysis provides that racial classifications are constitutional only if they further compelling governmental interests and are narrowly tailored measures. *Id.* at 227, 115 S.Ct. at 2113.

That the magnet admissions process uses racial classifications is clear. At the start of the process, CMS first fills seats with preferences based on whether the applicant lives in close proximity to the school and whether the applicant has any siblings in the school. (PX 53 (1997-98 Magnet Application Process); PX 44 at CM035759 (1992 Student Assignment Plan).) CMS then fills the remaining seats by selecting students from a black lottery and a non-black lottery until the precise racial balance is achieved. (PX 53 (1997-98 Magnet Application Process); Tr. 4/27 at 164-65 (Test. of David Wells).)

As stated in the 1992 student assignment plan: "Spaces in magnet schools will be allocated to a percentage of black students that equals the system-wide percentage of black students. Grade levels will maintain racial balance." (PX 44 at CM035757 (1992 Student Assignment Plan).) The policy further states:

> Racial balance will be maintained and applicants on a waiting list will only be admitted if the 40%/60% racial

> balance can be maintained. If there are insufficient applications to fill the program and create the appropriate racial balance, racial balance will be allowed to fluctuate, but *slots reserved for one race will not be filled by students of another race.*

(*Id.* at CM035760 (emphasis added); PX 8 at CM007233 (Mem. from Schiller to the Board of 11/4/99).) As likewise explained in a memorandum by Dr. Stolee to then-Superintendent Murphy: "Each magnet school should enroll a student body of 60% white and 40% black. If one race were to be underenrolled, *the other race should not be permitted to fill the vacant slots.*" (SX 56 at CMI01611 (Mem. from Dr. Stolee to Dr. Murphy of 6/11/92) (emphasis added).)

CMS has argued that because the admissions process involves other criteria besides race, namely, proximity and sibling preferences, it cannot be deemed a racial quota. Similar semantics regarding the race-based admissions policy of the Boston Latin School were rejected by the First Circuit:

> At a certain point in its application process ... the Policy relies on race and ethnicity, and nothing else, to select a subset of entrants. Thus, whether the Policy is truly a quota or whether it is best described otherwise is entirely irrelevant for the purpose of equal protection analysis. Attractive labeling cannot alter the fact that any program which ***288** induces schools to grant preferences based on race and ethnicity is constitutionally suspect.

Wessmann, 160 F.3d at 794; *see also Bakke,* 438 U.S. at 289, 98 S. Ct. at 2747 (observing that regardless of whether the

limitation at issue was "described as a quota or a goal," it was "a line drawn on the basis of race and ethnic status.").

In policy and in practice, the 60-40 racial requirement is an inflexible quota. In the case of Olde Providence School, where Cristina Capacchione applied to kindergarten for the 1996-97 school year, 104 seats were available for the incoming class; 42 of those seats were reserved for blacks, and 62 seats were reserved for non-blacks. (DX 273 (1996-97 Magnet Seats for Olde Providence); Tr. 6/14 at 67 (Test. of Susan Purser).) CMS received magnet applications for the 1996-97 school year in the early months of 1996. (Tr. 6/14 at 67 (Test. of Susan Purser); *see* PX 53 (Magnet Application Process.) After granting proximity and sibling preferences, 47 seats remained available: 26 black seats and 21 non-black seats. (DX 273 (1996-97 Magnet Seats for Olde Providence); Tr. 6/14 at 67, 173 (Test. of Susan Purser).) Then, in April 1996, CMS selected students from the black and non-black lotteries. (Tr. 6/14 at 67 (Test. of Susan Purser). The dual lottery managed to fill every non- black seat at Olde Providence and all but two black seats. (Id.)

While all blacks who applied to Olde Providence were admitted, more than a hundred non-blacks were placed on a waiting list.[50] (*Id.* at 178; PX 61 (1996-97 Magnet Waiting

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[50]CMS argues that Cristina's lottery number was high enough that she would not have obtained admission to Olde Providence even if race were not considered. (Tr. 6/14 at 68-69 (Test. of Susan Purser).) Likewise, Benjamin Gavreau, a child of one of the Plaintiff-Intervenors, had a lottery number that was too high to obtain admission at his magnet school of choice, Davidson IB, even if race were not considered. (Id. at 72.) This is not the proper standard for analyzing an equal protection violation. As stated by the Supreme Court in *Northeastern Fla. Chapter of the Associated*

Lists).) Rather than fill the two black vacancies with wait-listed applicants--which would have resulted in a student body well within the court-ordered racial balancing guidelines--CMS continued to actively recruit black applicants and even sought late applications on into and through the summer. (Tr. 6/14 at 174 (Test. of Susan Purser).) As the school year began in the fall, Olde Providence finally filled the last two vacancies, and the kindergarten class consisted of 41 blacks (39.4%) and 63 non-blacks (60.6%). (*Id.* at 77; Tr. 4/27 at 164-66 (Test. of Jonathan Wells); PX 64 (1996-97 Magnet Enrollment).) In this instance, Olde Providence deviated from official CMS policy; a non-black applicant received a black seat. In other magnet programs, however, where the admissions policy was strictly enforced, it was not uncommon for the school year to begin with seats remaining vacant because to admit students of one race would disrupt the desired racial balance. (Tr. at 4/27 at 164-66 (Test. of Jonathan Wells);

Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993):

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

See also Bakke, 438 U.S. at 280-81 n. 14, 98 S.Ct. at 2743 n. 14 ("[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing.").

Tr. 6/14 at 174-77, 195 (Test. of Susan Purser); PX 43 (CMS Magnet Options 1998- 99); PX 56 (Mem. from Henry to Smith of 10/I/96); PX 61 (1996-97 Magnet Waiting Lists); PX 63 (Magnet School Vacancies).)

Because CMS was still under court order when it implemented this procedure, ***289** the Court accepts that the school system was acting to further a compelling governmental interest, i.e., remedying the effects of past racial discrimination. CMS's alternative theory, that it has a compelling governmental interest in pursuing racial diversity, is therefore irrelevant. The Court notes, however, that a growing number of circuit courts have held, based on recent Supreme Court precedent, that diversity is never a compelling governmental interest, *Lutheran Church-Mo. Synod v. FCC,* 141 F.3d 344, 354 (D.C.Cir.1998); *Hopwood,* 78 F.3d at 948, and other courts have soundly rejected the diversity rationale based on the facts before them. *Wessmann,* 160 F.3d at 795-800, *Hayes,* 10 F.3d at 213.

In reviewing whether the magnet admissions procedure is narrowly tailored, the Court considers factors such as: (1) the necessity of the policy; (2) the flexibility of the policy, including the availability of waiver provisions; (3) the relationship of the numerical goal to the relevant population; (4) the burden of the policy on innocent third parties; and (5) the duration of the policy. *United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987) (plurality opinion); *Middleton v. City of Flint,* 92 F.3d 396, 409 (6th Cir.1996), *cert. denied,* 520 U.S. 1196, 117 S.Ct. 1552, 137 L.Ed.2d 700 (1997); *Hayes,* 10 F.3d at 216.

As to the necessity of the magnet admissions policy, the Court observes that CMS never was required to implement the

procedure in question, and, in fact, the procedure goes far afield from the guidelines set forth in *Swann.* 402 U.S. at 22-25, 91 S.Ct. at 1279-81. Contrary to the Supreme Court's admonition in *Swann,* CMS is using mathematical ratios not as a "starting point" but as an "ending point." *Id.* at 25, 91 S.Ct. at 1280. CMS unreasonably prohibits any variance from the 60-40 reservation of magnet seats by race. The result is that children are being denied the special benefits offered by magnet programs based solely on their race. This denial of equal footing occurs even where seats are available and where racial balancing goals under the desegregation order would not be affected.

It was especially unnecessary for CMS, after twenty years of operating under a desegregation order, to institute racial policies that were even more race conscious than what were originally ordered. *See Detroit Police Officers Ass'n v. Young,* 989 F.2d 225, 228 (6th Cir.1993) (holding that the same affirmative action program that had been upheld in the 1970s was no longer narrowly tailored or required to serve a compelling state interest because circumstances had changed over two decades). The Court originally sought to desegregate schools by assigning students based on the racial compositions of geographic zones. By comparison, the magnet admissions process focuses primarily on individual students' racial identities.

The inflexibility of the magnet admissions policy is particularly troubling. The Court is hard-pressed to find a more restrictive means of using race than a process that results in holding seats vacant while long waiting lists full of eager applicants are virtually ignored. At the very least, the admissions policy should have contained a waiver provision to

overcome this inflexibility. *Paradise,* 480 U.S. at 177-78, 107 S.Ct. at 1070. The Court also notes that flexibility is not demonstrated by the fact that some of the magnet programs deviate from a precise 60-40 ratio. The issue is not whether the racial classification produces a consistent outcome; the issue is whether the set-aside unjustifiably curtails the rights of others. *Wessmann,* 160 F.3d at 794. Thus, the fact that the magnet admissions policy allows for racial balance to "fluctuate" does not cure the fact that "slots reserved for one race will not be filled by students of another race." (PX 44 at CM035757 (1992 Student Assignment Plan).)

While the 60-40 numerical goal is related to the relevant population, i.e., the racial composition of schoolchildren in CMS, ***290** some consideration should have been given to the practicability of achieving this precise ratio in every magnet school. The Court notes that the system has one exception to the 60-40 target: Davidson IB, which has a 75% non-black--25% black enrollment requirement. (Tr. 5/19 at 86-88 (Test. of Calvin Wallace).) Davidson IB is excepted, presumably, because it is located in the northernmost area of the county, where achieving a 6040 ratio is impracticable. This 75-25 ratio is still well within the requirement of the 1974 CAG Plan that the black populations at optional schools be "at or above approximately 20%." *Swann,* 379 F.Supp. at 1108.

With regard to the burdens placed on third parties, the families with children placed on a waiting list must wait for months without knowing where their children eventually will be placed. Parents need to make accommodations regarding their child's education far in advance. It is unfair to allow this type of delay when, as discussed above, the strict adherence to a 60-40 ratio is wholly unnecessary. *See People Who Care,*

111 F.3d at 534 ("Children, the most innocent of the innocent persons brushed by draconian decrees, should not be made subjects of utopian projects.").

Finally, the 1992 magnet plan made no mention of the duration that CMS would use racially segregated lotteries, vacancies, and waiting lists. The temporal scope is important because preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. *Paradise,* 480 U.S. at 178-79, 107 S.Ct. at 1070.

In sum, the Court finds that the magnet school admissions policy is not properly tailored. In fact, there is no reasonable basis for the rigid set- asides. Essentially, CMS is "standing in the schoolhouse door" and turning students away from its magnet programs based on race, which is inconsistent with the movement towards race neutrality envisioned in *Brown I.*

3. Nominal Damages

As the Court already ruled out an award of actual damages, (Order of 5/28/99 at 1), CMS shall be held nominally liable in the amount of one dollar. The rationale for awarding nominal damages is that federal courts should provide some marginal vindication when a constitutional violation occurs, even if the injury is not measurably compensable. *Price,* 93 F.3d at 1246. Here, the award of nominal damages serves to vindicate the constitutional rights of children denied an equal footing in applying to magnet schools.

D. Injunctive Relief

Upon a declaration of unitary status, a district court must relinquish jurisdiction over a school system and restore control to state and local authorities. *Freeman,* 503 U.S. at 489, 112 S.Ct. at 1445. Notwithstanding the relinquishment of jurisdiction, courts that have dissolved desegregation orders simultaneously have entered "permanent injunctions" to the effect that the school system shall not intentionally segregate students and shall comply with the commands of the Fourteenth Amendment. *Wessmann,* 160 F.3d at 800- 01; *cf. Dowell,* 498 U.S. at 250, 111 S.Ct. at 638 ("A school district which has been released from an injunction ... of course remains subject to the mandate of the Equal Protection Clause."). Such an injunction operates as a negative injunction rather than a requirement of affirmative action because a school system that has achieved unitary status has satisfied the mandate of *Green* and therefore has no more affirmative obligation to actively desegregate. *Wessmann,* 160 F.3d at 801; *Riddick,* 784 F.2d at 534-39. Indeed, once a school system is declared unitary, the remedial justification for using race-conscious policies is gone, and the district must reevaluate any continuing use of race in school policy. *See Keyes,* 902 F.Supp. at 1282- 86 (declaring a school system unitary and cautioning that, "[i]n the future, the District's use of race ***291** ... will be subject to the constitutional limitations articulated by the Supreme Court in recent opinions, including *Adarand*....., and the requirements of applicable state and federal statutes").

In conjunction with their request for a unitary status declaration, the Plaintiff-Intervenors seek an injunction barring CMS from assigning students or otherwise allocating benefits to students based on race. In their post-trial briefing, the

Plaintiff-Intervenors suggested that CMS should report to the Court to confirm that all race-based policies throughout the system have been terminated and to describe and provide justification for any such policy that CMS seeks to maintain. (Pl.-Intervenors' Proposed Findings of Fact and Conclusions of Law at 110.) The Court believes that such administrative entanglement would be inconsistent with the relinquishment of court supervision. For similar reasons, the Court will not demand clearance of any future student assignment plans prior to implementation. See *Dowell,* 498 U.S. at 250, 111 S.Ct. at 638 (stating that, when courts return control to local authorities, those school systems "no longer require[ ] court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like.").

On the other hand, the Court is not precluded from granting injunctive relief as to the underlying § 1983 action. *See Evans v. Harnett County Bd. of Educ.,* 684 F.2d 304, 306 (4th Cir.1982) (holding that the district court committed clear error in failing to grant the plaintiff's requested injunctive relief under § 1983 because the court found an underlying constitutional violation and there was a possibility of prospective harm to others). As set forth above, the Court found that CMS's magnet school admissions policy went beyond constitutionally permissible bounds because it was not narrowly tailored and was not within the guidelines of the desegregation plan. *See supra* part II.C.2. Given that CMS now has achieved unitary status, the magnet admissions process is a *fortiori* unconstitutional. The additional problem is that, in a non-remedial, unitary status setting, the use of race in the admissions process does not further a compelling governmental interest.

CMS offers its "diversity" rationale as a justification for using race, but, as stated above, the emerging consensus is that achieving diversity is not a proper grounds for race-conscious action. *See supra* part II.C.2. CMS offered the testimony of a few lay witnesses to state for the record that racial diversity in classrooms is needed because as society becomes more racially heterogeneous, students must learn to communicate and cooperate with people of different backgrounds. (Tr. 6/9 at 7-14 (Test. of Ed Crutchfield); Tr. 6/17 at 63-70 (Test. of Jackie Fishman); Tr. 6/16 at 185-94 (Test. of James Woodward).) While the bases offered for this testimony were vague and inconclusive,[51] the Court accepts that children may derive benefits from encounters with students of different races. Nevertheless, a major problem with the single-minded focus on racial diversity is that it produces diversity in nothing but race. Children are not viewed as individual students but as cogs in a social experimentation machine.

In *Wessmann*, the First Circuit addressed the diversity justification in the public school context. 160 F.3d at 796-800. There, the court held that a student assignment policy that reserved school ***292** seats based on race was not justified in the name of achieving diversity. *Id.* at 800. In so holding, the

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[51]For example, CMS called Ed Crutchfield, CEO of First Union Bank, to testify that employees enter the workplace with a handicap if they attended schools that are all or virtually one race. (Tr. 6/9 at 12-14 (Test. of Ed Crutchfield).) Yet, Crutchfield also testified that employees who attended historically black colleges are not limited in their potential for success. (*Id.* at 19.) Similarly, Jackie Fishman, a CMS teacher, testified that racial diversity in essential to having meaningful discussions in the classroom, but her basis for making such a statement was limited because she has never taught a class that was racially homogeneous. (Tr. 6/17 at 71-73 (Test. of Jackie Fishman).)

court rejected a similar litany of generalizations lauding the benefits of racial diversity. Stated the court: "[T]he potential for harmful consequences prevents us from succumbing to good intentions. The Policy is, at bottom, a mechanism for racial balancing--and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden." *Id.* at 799 (citing *Freeman,* 503 U.S. at 494, 112 S.Ct. at 1447; *Croson,* 488 U.S. at 507, 109 S.Ct. at 729); *see also Metro Broadcasting,* 497 U.S. at 602, 110 S.Ct. at 3029 (O'Connor, J., dissenting) ("Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.").

In the present case, the Court finds that CMS's pursuit of diversity is likewise nothing more than a means for racial balancing. In addition, the Court finds that CMS's desire to use racial student assignments for diversity purposes suffers from the same fatal defect recognized with regard to the "role model theory" in *Wygant v. Jackson Bd. of Educ.,* "no logical stopping point." 476 U.S. 267, 275, 106 S.Ct. 1842, 1847,90 L.Ed.2d 260 (1986) (plurality opinion); *see also* Douglas W. Kmiec & Stephen B. Presser, *The American Constitutional Order History Cases and Philosophy* 1270-73 (1998) (observing that diversity as a rationale for racial preferences in public education appears to have been ruled off-limits, in part because its rationale applies in perpetuity).

Because, in a unitary setting, the magnet school admissions process cannot clear the first hurdle of strict

scrutiny by showing a compelling governmental interest, the Court enjoins CMS from any further use of race-based lotteries, preferences, and set-asides in student assignment.[52] Absent a constitutionally permissible remedial justification, CMS shall not foreclose students from consideration for admission into certain schools or educational programs simply because of their racial or ethnic category.

E. Attorneys Fees

A prevailing party in a case brought under federal civil rights law is entitled to recover his or her reasonable attorneys' fees and expert witness fees. 42 U.S.C. § 1988(b)-(c) (1999); *Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983). The awarding of attorneys' fees to a prevailing party is particularly appropriate in a school desegregation case.[53] *Jenkins,* 967 F.2d at 1251; *Swann,* 66 F.R.D. at 484.

In the present case, the Plaintiff-Intervenors prevailed after taking on the extraordinary burden of proving that CMS had achieved unitary status. This task was particularly challenging given that CMS was the party with the most ready access to the voluminous information on the issues before the Court. Moreover, the Court had to intervene in several discovery matters due to CMS's refusal to produce documents

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[52]In the interest of stability, this injunction shall not affect assignments for the 1999-2000 school year that are already in place at the time of this order.

[53]The Swann Plaintiffs have acknowledged this point repeatedly. (Swann Pl.'s Trial Brf. at 26; Swann Pl.'s Supplemental Br. on Damages at 2; Swann Pl.'s Mot. Directed Verdict at 20.)

and identify witnesses. (*See* Order of 9/16/98 (ordering CMS to produce documents with warning of sanctions); Order of 10/7/98 (observing CMS's lack of cooperation in releasing information); Order of 11/23/98 (noting that CMS's pretrial tactics were causing "unnecessary obstruction and delay"); Order ***293** of 4/23/99 (sanctioning CMS for improperly concealing trial witnesses).)

The Court also considers the public interest involved. Prevailing third- party intervenors, similar to prevailing desegregation plaintiffs, should be compensated for their monumental efforts in keeping a school system in compliance with the Constitution. As noted by the Second Circuit in a similar case: "An open-ended remedial regime, in combination with a potentially collusive alignment of parties, can create a troubling dynamic." *City of Yonkers,* 181 F.3d 301, 317. In such circumstances, there is a danger that a school system might overextend its use of race-based remedies in a constitutionally impermissible way unless a third party intervenes. Given the tremendous expense of mounting such a challenge, intervening parties would be at a considerable disadvantage if they were barred from collecting fees after successfully litigating the suit. Of course, if the intervenors' challenge to continued court supervision was "frivolous, unreasonable, or without foundation," they would end up paying the attorneys' fees of the plaintiffs responsible for monitoring a desegregation plan. *Jenkins,* 967 F.2d at 1250 (citing *Independent Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, 761, 109 S.Ct. 2732, 2736, 105 L.Ed.2d 639 (1989)).

The Court finds that the Plaintiff-Intervenors are the prevailing parties in this litigation and are therefore entitled to reasonable attorneys' fees, expert fees, and costs. *See Texas*

Teachers Ass'n v. Garland School Dist., 489 U.S. 782, 791, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989) ("A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought."). Plaintiff-Intervenors shall submit to the Court a list of their reasonable fees and costs within thirty days from entry of this Order. CMS will be given an opportunity to raise any objections before these fees and costs are taxed.

CONCLUSION

Federal court supervision is invoked in desegregation cases to ensure "equal racial access to schools, not access to racially equal schools." *Freeman*, 503 U.S. at 503, 112 S.Ct. at 1452 (Scalia, J., concurring); *cf. Swann*, 402 U.S. at 24, 91 S.Ct. at 1280 (rejecting "as a matter of substantive constitutional right" any guarantee of racial balance in schools). Too often, as was illustrated here, this concept has gotten lost in a numbers game of non- remedial racial balancing goals. Ultimately, a unitary status determination hinges on whether a school system has remedied a past constitutional violation. *Freeman*, 503 U.S. at 489, 112 S.Ct. at 1445. The Court finds that CMS fulfilled this purpose quite some time ago.

It is likewise improper for a district court or a school board to prolong the life of a desegregation order by using it as a pretext for launching institutional reforms unrelated to dismantling a dual system. CMS faces a Sysiphean challenge in assigning and educating students. In the absence of any remedial necessity, the Court will not add to that conundrum by requiring additional affirmative obligations that address socioeconomic concerns or societal discrimination. It is telling that CMS's current superintendent was unable to articulate any

benefit from continued active court supervision. (Tr. 6/8 at 89-92, 148-50 (Test. of Eric Smith).) In fact, he stated that CMS was aggressively attacking many problems and that it would be best for the Court to stay out of the way. (*Id.*) The Court will take the superintendent at his word.

To summarize, on the basis of the record in this consolidated action, the Court makes the following findings and conclusions:

1. CMS has eliminated, to the extent practicable, the vestiges of past discrimination in the traditional areas of school operations--student assignment, faculty assignment, facilities, transportation, staff, and extracurricular ***294** activities--and no vestiges are found in the ancillary areas of teacher quality, student achievement, and student discipline.

2. CMS has complied in good faith with the desegregation orders since the close of *Swann*, and there is no indication that CMS will return to a de jure segregated system in the future.

3. CMS has achieved unitary status in all respects; therefore, all prior injunctive orders from *Swann* are vacated and dissolved.

4. In pursuing racial balance, CMS's magnet school admissions process went beyond the scope of the *Swann* orders and included an inflexible racial assignment provision that was not narrowly tailored.

5. The Plaintiff-Intervenors are not entitled to an award of actual damages, but, given that the magnet school admissions policy was found to violate the Equal Protection Clause, CMS is nominally liable to the Plaintiff-Intervenors in the amount of one dollar ($1.00).

6. CMS is enjoined from assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race.

7. The Court finds that the Plaintiff-Intervenors are the prevailing parties in this litigation and are therefore entitled to reasonable attorneys' fees, expert fees, and costs.

IT IS SO ORDERED.

Order of the District Court of April 14, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

WILLIAM CAPACCHIONE, Individually and on Behalf of CRISTINA CAPACCHIONE, a Minor, Plaintiff, v. CHARLOTTE-MECKLENBURG SCHOOLS et al., Defendants.	3:97-CV-482-P
JAMES E. SWANN et al., Plaintiffs, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION et al., Defendants.	3:65-CV-1974-P
MICHAEL P. GRANT et al., Plaintiff-Intervenors,	

v.)
)
CHARLOTTE-MECKLENBURG)
BOARD OF EDUCATION et al.,)
)
Defendants)
)

PRETRIAL CONFERENCE SUMMARY AND ORDER

THESE MATTERS are before the Court on various pretrial motions raised during the pretrial briefs, proposed factual findings, and proposed issue statements. In addition, Plaintiff Capacchione and Plaintiff-Intervenors Grant et al. (hereinafter collectively ("Grant") filed a Motion in Limine Regarding Undisclosed Witnesses [document no. 143, filed April 12, 1999], and Defendant Charlotte-Mecklenburg Board of Education ("CMS") filed a Motion in Limine to Exclude New Expert Opinions and Analyses by David Armor [document no. 147, filed April 13, 1999]. The Court addresses the various motions below.

I. Notice to Parties Regarding Filings

As an initial administrative matter, all parties are directed to file any papers in these matters no later than 4:00 p.m. on the day the filing is due. Additionally, all filings should include the original and four copies (an original for the Capacchione file, one copy for the Swann file, one copy for Judge Potter, one copy for the law clerk, and one copy for the filing party). Finally, the parties are reminded to double-check

the case numbers on the captions of the filings, as many papers have been filed under the wrong case number.

II. Grant's Motion in Limine Regarding Undisclosed Witnesses

Grant argues that CMS has engaged in sanctionable conduct by refusing to disclose the non-expert witnesses it plans to call at trial. Grant sought this information by interrogatories submitted May 21, 1998, and later moved the Court to compel this information from CMS. In its ruling of September 16, 1998, the Court stated that, at the time, it was premature for CMS to disclose its trial witnesses; yet, the Court ordered CMS to provide Grant with such information "when such information becomes known." (Order of Sept. 16, 1998, at 7.)

As of the pretrial conference, CMS only had identified one non-expert witness, Superintendent Eric Smith. Surely, CMS has known for some time which witnesses it intends to call and what the subject matter of each of its witnesses' testimony will be. Nevertheless, CMS contends that it does not have to disclose its witnesses until the first day of trial because the Pretrial Order requires the submission of a witness list *to the Court* at that time. (Pretrial Order and Case Management Plan §IV, ¶¶(5))a)-(b).) This provision of the Pretrial Order was not intended to allow a party to conceal information from opposing counsel. Therefore, CMS, contrary to its assertion otherwise, would not be violating the Pretrial Order by disclosing its witnesses *to opposing counsel* prior to the first day of trial, especially when the Court ordered that such information be disclosed when it becomes available. Moreover, the Federal Rules of Civil Procedure clearly set forth a party's duty to disclose and to supplement essential information such

as trial witnesses. Fed. R. Civ. P. 26, 33, 37. In a case of this magnitude, CMS's refusal to disclose such information evidences a lack of candor and runs contrary to the notions of fundamental fairness.

During the pretrial conference, the Court ordered CMS to provide lists of possible witnesses to Grant by Wednesday, April 14, 1999, at 9:00a.m. To the extent that the other parties had not exchanged such information, they too were required to exchange witness lists by this deadline. Failure to comply with this Order may preclude the presentation of undisclosed witnesses. Grant's request for sanctions—in addition to its previous requests for discovery sanctions—will be addressed by the Court at the end of trial.

III. Proposed Issues for Trial

The parties are in agreement that the central issue of this trial is whether the school system has achieved unitary status. The parties are also in agreement that the specific issue statements governing this trial will require some factual development.

The only objection raised at this time relates to Grant's claims for damages pursuant to 42 U.S.C. § 1983. The Swann Plaintiffs and CMS argue that CMS cannot be held liable for compensatory relief because it was merely following the Court's 1971 desegregation order by implementing race-based policies. Additionally, the Swann plaintiffs and CMS represent that black plaintiffs in school desegregation cases have never been awarded damages; therefore, the white plaintiffs in this case should not be entitled to such relief. Grant asserts that the Swann Plaintiffs never sought damages, only an injunction.

Grant implicitly argues that damages were not at issue in other such cases because classes of black plaintiffs could not maintain their class action status if damages were sought; consequently, they only sought injunctive relief. As to this issue, the Court simply reiterates from a prior ruling that nominal damages are still appropriate when en equal protection violation has occurred, even without proof of factual injury. (Order of Dec. 22, 1998, at 5-7 (citing Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993); Price v. City of Charlotte, 93 F. 3d 1241, 1246 (4th Cir. 1996)).)

This issue would have been more properly raised in a summary judgment motion rather than as a oral request one week before trial. The Court will allow the parties to brief the issue further, if desired. In any event, the Court does not anticipate that any damages evidenced presented by Grant would take up significant trial time.

IV. Order of Witness Presentation

The order of witness presentation at trial shall be Grant first, the Swann Plaintiffs second, and CMS last, followed by the plaintiffs' rebuttal.

V. Exchange of Exhibit Numbers

In order to facilitate the presentation of documentary evidence and to avoid unnecessary objections and delays, all parties shall exchange trial exhibit numbers by close of business on Thursday, April 15, 1999.

Order of the District Court of April 14, 1999

VI. Opening Statements and Closing Arguments

On Monday, April 19, 1999, the first day of trial, each party shall have thirty minutes to present opening statements. This time restriction is necessary due to Grant's scheduling of an out-of-town witness for the first day of trial. Should any party need additional time to present opening statements, that party will be given up to thirty minutes more on Tuesday, April 20, 1999. Each party shall have one hour each for closing arguments.

VII. Daily Trial Schedule

The Court will be called by session each morning at 9:30 a.m. and will conclude each day around 4:30 or 5:00 p.m. The parties are advised to consult each other regularly on the anticipated witnesses for the following day of trial.

VIII. Proposed Finding of Fact and Conclusions of Law

Obviously, the Court will defer any findings of fact until after the evidence is presented. The Court will set a deadline for post-trial briefs at the end of the trial.

IX. Admissibility of CMS's New Remedial Plan

CMS seeks to introduce a new comprehensive school equity plan, which the School Board recently passed by a non-unanimous vote. CMS presented this plan to the Court late Monday afternoon, April 12, 1999, just a week before trial. This plan is not relevant or at issue in the current case. At this phase of the litigation, this case is only about what CMS has done, not what it may do in the future. There are far too many

contingencies regarding the plan, including whether it will be funded or fully implemented. The Court will not deliver an advisory opinion on the constitutionality of a plan not in effect.

If the Court later determines that additional remedial measures are needed, it may consider the plan. Until that time comes, however, the Court will not get mired in the complex details and mechanics of a proposed plan.

X. Collateral Estoppel Effect of Prior Court Orders in Swann

Grant moves the Court to consider whether prior orders issued in the Swann litigation by Judge McMillan, specifically those orders finding that no vestiges of de jure segregation existed in certain areas of school operation, have a preclusive effect in this case. The Court will certainly consider the relevant findings of Judge McMillan and the scope of his desegregation order, but, in light of the Eleventh Circuit's recent holding in United States v. Georgia, No. 97-9199, 1999 WL 193887 (11th Cir. April 8, 1999), the Court is cognizant that a finding of "unitary status" involves a careful factual assessment of many factors. Thus, the Court will examine the appropriate areas of inquiry set forth in Freeman v. Pitts, 503 U.S. 467, 112 S. Ct. 1430, 118 L. Ed. 2d (1992), and will consider those areas as a whole in determine whether the school system has achieved unitary status. The Court further notes that because this is a bench trial, the Court has latitude to allow evidence during the hearing and to consider later whether such evidence is admissible.

Order of the District Court of April 14, 1999

XI. CMS's Motion in Limine to Exclude New Expert Opinions and Analyses by David Armor

CMS moves to exclude any expert opinions and analyses by Grant's expert, Dr. David Armor, that were presented to CMS after the deadline for submitting rebuttal expert reports had expired. CMS represented that Dr. Armor submitted new analyses more than a month after the deadline and up to a week before trial, thereby prejudicing CMS denying them an adequate opportunity to depose Dr. Armor on the new opinions and to prepare for cross-examination.

Experts are prohibited from offering opinions that were not stated in a timely expert report. Fed. R. Civ. P. 26(a)(2), 37(c)(I); see, e.g., Williams v. Burlington Northern and Santa Fe Ry. Co., 13 F. Supp. 2d 1125, 1127 (D. Kan. 1998) ("Pursuant to Fed. R. Civ. P. 26(a)(2)(B) and 37(c)(I), any opinions not expressed in Dr. Jetzer's written reports must be excluded from this case."); LaMarca v. United States, 31 F. Supp. 2d 110, 122 (E.D.N.Y. 1998) (excluding testimony that "exceed[ed] the bounds of the expert's report"). Absent a showing of substantial justification or harmlessness, Dr. Amor's new opinions and analyses that were not provided by the applicable deadlines must be excluded. Thus, CMS's motion is granted.

XII. Tentative Hearing Cancelled

The Court tentatively scheduled a hearing for Friday, April 26, at 10:00 a.m., to discuss any further matters that may arise. The Court sees no outstanding issues that need to be addressed at this time, so this tentative hearing is hereby cancelled.

Order of the District Court of April 14, 1999

IT IS SO ORDERED.
This the 14th day of April 1999.

/s/ Robert D. Potter
ROBERT D. POTTER
SENIOR UNITED STATES
DISTRICT JUDGE

Judgment of the Court of Appeals

JUDGMENT

FILED: SEPTEMBER 21, 2001

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 99-2389
CA-65-1974-3-P
CA-97-482-3-P

TERRY BELK; DWAYNE COLLINS, on behalf of themselves and the class they represent;

Plaintiffs - Appellants

v.

WILLIAM CAPACCHIONE, Individually and on behalf of Cristina Capacchione, a minor, MICHAEL P. GRANT; RICHRD EASTERLING LAWRENCE GAUVREAU; KAREN BENTLEY; CHARLES THOMPSON; SCOTT C. WILLARD

Plaintiffs - Appellees

and

THE CHARLOTTE-MECKLENBERG BOARD OF EDUCATION; ERIC SMITH Superintendent in his official

capacity; ARTHUR GRIFFIN Chairman of the Charlotte-Mecklenburg School Board, in his official capacity

Defendants

UNITED STATES OF AMERICA; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS ASSOCIATION

Amici Curiae

NO. 99-2391
CA-65-1974-3-P
CA-97-482-3-P

WILLIAM CAPACCHIONE, Individually and on behalf of Christina Capacchione, a minor; MICHAEL P. GRANT; RICHARD EASTERLING; LAWRENCE GAUVREAU; KAREN BENTLEY; CHARLES THOMPSON; SCOTT C. WILLARD

Plaintiff - Apellees

and

TERRY BELK, DWAYNE COLLINS, on behalf of themselves and the class they represent

Plaintiffs

v.

THE CHARLOTTE -MECKLENBURG BOARD OF EDUCATION; ERIC SMITH, Superintendent, in his official capacity; ARTHUR GRIFFIN, Chair of the Charlotte-Mecklenberg School Board, in his official capacity

Defendants - Appellants

UNITED STATES OF AMERICA; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS

Amici Curiae

No. 00-1098
CA-65-1974-3-P
CA-97-482-3-P

WILLIAM CAPACCHIONE, Individually and on behalf of Christina Capacchione, a minor; MICHAEL P. GRANT; RICHARD EASTERLING; LAWRENCE GAUVREAU; KAREN BENTLEY; CHARLES THOMPSON; SCOTT C. WILLARD

Plaintiffs - Appellees

and

TERRY BELK; DWAYNE COLLINS, on behalf of themselves and the class they represent

Plaintiffs

v.

THE CHARLOTTE -MECKLENBURG BOARD OF EDUCATION; ERIC SMITH, Superintendent, in his official capacity; ARTHUR GRIFFIN, Chair of the Charlotte-Mecklenberg School Board, in his official capacity

Defendants - Appellants

- -

UNITED STATES OF AMERICA; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS

Amici Curiae

No. 00-1432
CA-97-482-3-P

WILLIAM CAPACCHIONE, Individually and on behalf of Christina Capacchione, a minor; MICHAEL P. GRANT; RICHARD EASTERLING; LAWRENCE GAUVREAU; KAREN BENTLEY; CHARLES THOMPSON; SCOTT C. WILLARD

Plaintiffs - Appellees

and

TERRY BELK; DWAYNE COLLINS, on behalf of themselves and the class they represent

Judgment of the Court of Appeals

Plaintiffs

v.

THE CHARLOTTE -MECKLENBURG BOARD OF EDUCATION; ERIC SMITH, Superintendent, in his official capacity; ARTHUR GRIFFIN, Chair of the Charlotte-Mecklenberg School Board, in his official capacity

Defendants - Appellants

UNITED STATES OF AMERICA; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS

Amici Curiae

Appeal from the United States District Court for the Western District of North Carolina at Charlotte

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In accordance with the written opinion of this Court filed this day, the Court affirms and reverses in part the judgment of the District Court.

/s/ Patricia S. Connor

CLERK

Order of the Court of Appeals on Rehearing

United States Court of Appeals,
Fourth Circuit.

Terry BELK; Dwayne Collins, on behalf of themselves and the class they represent, Plaintiffs-Appellants,

v.

William CAPACCHIONE, Individually and on behalf of Christina Capacchione, a minor; Michael P. Grant; Richard Easterling; Lawrence Gauvreau; Karen Bentley; Charles Thompson; Scott C. Willard, Plaintiffs-Appellees,

and

The Charlotte-Mecklenburg Board of Education; Eric Smith, Superintendent, in his official capacity; Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board, in his official capacity, Defendants.

United States of America; North Carolina School Boards Association; National School Boards Association, Amici Curiae.

William Capacchione, Individually and on behalf of Christina Capacchione, a minor; Michael P. Grant; Richard Easterling; Lawrence Gauvreau; Karen Bentley; Charles Thompson; Scott C. Willard, Plaintiffs-Appellees,

and

Terry Belk; Dwayne Collins, on behalf of themselves and the class they represent, Plaintiffs,

v.

The Charlotte-Mecklenburg Board of Education; Eric Smith, Superintendent, in his official capacity; Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board, in his official capacity, Defendants-Appellants.

Order of the Court of Appeals on Rehearing

United States of America; North Carolina School Boards Association; National School Boards Association, Amici Curiae.

William Capacchione, Individually and on behalf of Christina Capacchione, a minor; Michael P. Grant; Richard Easterling; Lawrence Gauvreau; Karen Bentley; Charles Thompson; Scott C. Willard, Plaintiffs-Appellees,
and
Terry Belk; Dwayne Collins, on behalf of themselves and the class they represent, Plaintiffs,
v.
The Charlotte-Mecklenburg Board of Education; Eric Smith, Superintendent, in his official capacity; Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board, in his official capacity, Defendants-Appellants.

United States of America; North Carolina School Boards Association; National School Boards Association, Amicus Curiae.

William Capacchione, Individually and on behalf of Christina Capacchione, a minor; Michael P. Grant; Richard Easterling; Lawrence Gauvreau; Karen Bentley; Charles Thompson; Scott C. Willard, Plaintiffs-Appellees,
and
Terry Belk; Dwayne Collins, on behalf of themselves and the class they represent, Plaintiffs,
v.
The Charlotte-Mecklenburg Boardof Education; Eric Smith, Superintendent, in his official capacity; Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board, in his official capacity, Defendants-Appellants.

Order of the Court of Appeals on Rehearing

United States of America; North Carolina School Boards Association; National School Boards Association, Amici Curiae.

No. 99-2389.

Dec. 14, 2001.

ORDER

*1 The Grant-Intervenors-Appellees and the Capacchione-Intervenor-Appellee each filed a motion to reconsider the issue of attorneys' fees and a motion to stay the mandate pending resolution of the motion to reconsider. The motion to reconsider is denied by a vote of 6-5 (Chief Judge Wilkinson and Judges Niemeyer, Michael, Motz, King, and Gregory in the majority). The motions to reconsider effectively stayed the mandate, but that stay is now lifted. Chief Judge Wilkinson filed an opinion concurring in the denial of rehearing. Judge Traxler filed an opinion dissenting from the denial of rehearing in which Judges Widener and Wilkins joined.

The motion of the Belk plaintiffs for a stay of the mandate is denied.

WILKINSON, Chief Judge, concurring in the denial of reconsideration:

The matter of attorneys' fees has been extensively debated in the en banc decision of the court and I have no

desire to belabor it. In view of my good colleague's dissent, however, I shall briefly state the basis for my view that a departure from the American rule, whereby each side pays its own lawyers, is not warranted with respect to the unitary status determination.

Such a departure is not justified for the simple reason that Congress has not authorized it. The Supreme Court has made clear that Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Under the American rule, "we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.,* 532 U.S. 598, 121 S.Ct. 1835, 1839, 149 L.Ed.2d 855 (2001) (internal quotation omitted). There is no such authority here.

The dissent attempts to analogize the unitary status proceedings to an action under 42 U.S.C. § 1983, for which attorney's fees would be available to prevailing parties at the discretion of the court under 42 U.S.C. § 1988. What we have here, however, is the exact opposite of a § 1983 action. The essence of a § 1983 action is that the defendant has violated the plaintiff's federal rights under color of state law. In contrast, the entire point of a unitary status determination is to prove that the school district is in compliance with federal law. And Congress has simply not authorized us to impose attorney's fees on a party whose actions have been adjudged compliant with federal statutes and our Constitution.

Order of the Court of Appeals on Rehearing

While the dissent would have us believe that the Grant and Capacchione plaintiffs simply picked up where the *Swann* plaintiffs left off, this is simply not the case. The focus of their respective efforts was quite different. The *Swann* plaintiffs sought to prove the school board in violation of the bedrock federal mandate that no student be denied an education on account of his or her race. The unitary status proceedings sought to determine, by contrast, that the rights of all school children under federal law had been vindicated and achieved.

*2 It is important that the judicial system not blow hot and cold with respect to the litigants who come before it. For many decades the courts impressed upon the Charlotte-Mecklenburg school district the singular importance of desegregating its public schools and affording each and every child an equal educational opportunity without regard to race. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("[S]chool authorities are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.") (internal quotation omitted). Now that this goal of unitariness has been reached, it would be inconsistent in the extreme to punish the school board for doing the very thing the courts have all along insisted that it do.

My good dissenting brother urges us to view this matter as one of equity or policy. I readily agree that the Grant and Capacchione plaintiffs have performed a substantial public service in achieving the unitary status determination and in returning the school system to the control of local authorities. As a matter of equity, however, there is also something to be said for looking to the future, putting this litigation behind us,

and spending public funds on the education of school children rather than on opposing lawyers' bills. The dissent predicts that unitary status proceedings will become unaffordable in the absence of fee shifting, but it is quite possible that school boards in other locations will be moved to free themselves from court orders on their own without the need for private interveners to enter the suit. In all events, these are questions of pure policy and underscore the inadvisability of courts debating the pros and cons of fee shifting in the absence of a congressional declaration.

It is simply untenable to impose a large fee obligation upon a public school district for desegregating its schools. Congress has not sanctioned such a course of action. It would mark a cruel sequel to the *Brown* decision if, at the end of the day, federal courts were to punish the successful completion of the desegregation process with an unauthorized departure from the American rule.

TRAXLER, Circuit Judge, dissenting:

I respectfully dissent from this court's denial of Capacchione's and Grant's motions to reconsider their claims to attorneys' fees for the role they played as private attorneys general in achieving a declaration of unitary status. As a result of this declaration, CMS must have a race-neutral student assignment plan in place no later than the 2002-2003 school year unless its use of race is narrowly tailored to serve a compelling governmental interest. The plaintiff- intervenors have prevailed against CMS and have obtained a decree that alters the conduct of CMS toward all children attending public school in Mecklenburg County. Yet, this court vacates the

district court's fee award on the ground that the plaintiff-intervenors have not prevailed.

***3** School desegregation cases are unique in the manner in which they proceed. There are two basic steps in the court process to obtain unitary status. In the first part, the plaintiffs seek to impose federal court control over the school system and to have federal courts dictate procedures for the operation of the schools. When the court-ordered procedures have worked, the second part begins with the parties returning to district court to obtain a declaration of unitary status and the concomitant removal of federal court oversight.

This case began in 1965 when the original *Swann* plaintiffs brought a § 1983 action to convert CMS "into a unitary nonracial system wherein educational opportunities offered by [the board] are made available to all students without regard to race or color." J.A. XXXIII-16,162. The *Swann* plaintiffs succeeded in having CMS placed under court order and participated in proceedings whereby the district court adopted a sweeping desegregation plan. In 1975, the case was removed from the active docket and the *Swann* plaintiffs were deservedly and properly awarded $204,072.33 in fees and costs for their service as private attorneys general in the first phase of the desegregation effort.

For the most part, this case remained inactive until 1997, when Capacchione challenged CMS's magnet schools program and, shortly thereafter, amended her complaint to seek a declaration of unitary status as well. *Swann* was reactivated and Capacchione intervened in that action. Grant then moved for a declaration of unitary status and also intervened in the *Swann* litigation. Thus began the second part of the process.

The *Swann* plaintiffs, however, did not want the second and final phase of the judicial process to occur, so they fought a finding of unitary status. Capacchione and Grant had to step in and prove to the district court that what the *Swann* plaintiffs originally sought in their lawsuit under § 1983 had, in fact, been achieved--that what had been started in the 1960s had finally been completed and the vestiges of segregation removed to the extent practicable. And like the *Swann* plaintiffs, who received a fee award for work done before the case was removed from the active docket, the plaintiff- intervenors now seek, and are entitled to, their attorneys' fees.

No member of the court doubts that the *Swann* plaintiffs would be entitled to fees under § 1988 had they been the ones to successfully move for a declaration of unitary status. Yet in spite of the same measure of success by the plaintiff-intervenors, we deny them their fees. By judicial fiat, plaintiff-intervenors in school desegregation cases have been written out of § 1988. Should another case like this arise where the original plaintiffs and the school board are content to let the desegregation order remain in place long after the dual system has been dismantled, parents demanding a return of local control will be helpless. As the present case demonstrates, a declaration of unitary status can be expensive ($1.49 million). I have no doubt that if our decision had been on the books in 1997 neither Capacchione, nor Grant, nor virtually any other public school parent in Mecklenburg County could have afforded to seek a removal of the federal courts from control of the school system. I find it ironic that in affirming the district court's declaration of unitary status but denying the prevailing parties their fees, we simultaneously condemn other school districts in our circuit to prolonged and unnecessary federal court control.

*4 Finally, while unfortunate that the school board should have to pay such a large award, this is a risk it took when it decided to fight the unitary status determination--not unlike the ill-fated decision it made in the 1960s to fight the desegregation effort to begin with, when we made it pay the fees of the original *Swann* plaintiffs. For attorneys' fees purposes, this court has decided that one party can get its fees under § 1988 for forcing the school board to abide by the law while the other cannot. Therefore, I respectfully dissent.

Judge WIDENER and Judge WILKINS have authorized me to indicate that they join in this dissent.

No. 01-1122

Supreme Court, U.S.
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In The Supreme Court of the United States

TERRY BELK, et al.,

Petitioners,

v.

WILLIAM CAPACCHIONE, MICHAEL GRANT, et al.,
and
THE CHARLOTTE-MECKLENBERG BOARD OF EDUCATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the courts below properly concluded that the Charlotte-Mecklenburg Schools had obtained unitary status given the overwhelming evidence of good faith compliance with the desegregation orders including decades of sustained high levels of racially balanced schools and affirmative efforts to eradicate all vestiges of past discrimination to the extent practicable?

(2) Whether the findings of the courts below that CMS had complied with the desegregation orders to the extent practicable, were clearly erroneous?

(3) Whether the courts below abused their discretion by refusing to consider cumulative and speculative evidence of a theoretical student assignment plan that had not been implemented prior to the unitary status hearing?

LIST OF PARTIES

Respondents agree with the list of parties contained in the Petition for a Writ of Certiorari with the exception that Lawrence Gauvreau is no longer a party to this case.

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STATEMENT OF THE CASE

Petitioners Statement of the Facts is deficient because it omits multiple material facts and repeatedly misstates facts. Respondents submit the following to correct these omissions and errors.

1. Petitioners' Long Term Acquiescence in What They Now Allege to be "Violations" of the Desegregation Order

In long running desegregation cases, it is essential to evaluate the history of the case to determine whether and how often the plaintiffs had to return to court to compel the school system to abide by the desegregation order. This is a particularly important inquiry in the context of a judicial determination as to whether a school system has achieved unitary status.

For the nearly one quarter of a century encompassing the period during which Petitioners now claim the Charlotte-Mecklenburg Board of Education (CMS) failed to effectively desegregate its schools, they never "alleged failure by the board to comply with the district court's desegregation orders." (16a). Indeed, even though "two generations of students ha[d] passed through CMS . . ." during this time, "not one person . . . returned to court alleging that segregative practices ha[d] been continued or revived." (6a, 339a). The district court has never sanctioned or enjoined CMS for failure to comply with its orders. (339a). In fact, the only sanctions imposed on CMS since 1974 have been in the current litigation over unitary status due to "its over zealous attempt to keep the desegregation orders in place . . ." by improperly concealing trial witnesses. (339a-340a).

During the two month unitary status trial, it became obvious that CMS and Petitioners had been colluding for decades to delay any declaration of unitary status. There was consensus that a race-based student assignment plan was desirable, not just as an agent to bring about desegregation, but as a means to combat demographics change to foster long term racial diversity in all system schools. That explains why Petitioners only voiced "objections" to the desegregation process when a

declaration of unitary status, and a corresponding end to court ordered busing, were sought by Respondents.

In moving to reopen the old *Swann* desegregation case, inactive since 1975, Petitioners did not seek any specific remedy aimed at correcting any alleged resegregative act by CMS. (17a). Petitioners generalized criticisms of CMS's thirty year record of desegregation were asserted as a defensive measure taken in response to Respondent Capacchione's lawsuit challenging the continued use of strict racial quotas in the magnet school admission process. The fact CMS then sided with Petitioners in seeking to prolong federal supervision is ample proof of the collusion, aimed not at desegregation, but at sustaining and legitimizing the indefinite use of racial quotas in the student assignment process.

2. CMS's Continuous Record of Good Faith Compliance with the Desegragation Orders

CMS took the counter-intuitive position at trial that it had failed to comply with the desegregation orders. Yet, several former school board members testified that the court's desegregation orders had become "institutionalized", and there had been unfailing compliance with the desegregation orders. (49a). One former board member testified that, during her ten year tenure, "every board member she ever worked with was committed to complying with the desegregation order." (343a). In fact, CMS's own expert prepared a 1992 report which concluded that CMS had always, 'in good faith, complied with the orders of the court." (49a-50a).

Former CMS superintendent, Dr. John Murphy, testified that, by 1992 "CMS was unitary . . . ." (50a). Moreover, he conceded that "no effort was made to dissolve the court order" because, *inter alia,* he thought it was politically preferable "to remain under court order so CMS could continue to racially balance schools even though the de jure violation had been remedied." (51a).

The appeals court said it best in concluding the desegregation orders had "been institutionalized to the point that CMS officials [could not] imagine life without them".

(51a). CMS had transformed the desegregation order, intended to be a temporary measure to eradicate vestiges of past discrimination, into "mechanisms for the attainment of different goals." (52a). CMS institutionalized the desegregation process by going "beyond what the Court's orders required" and racially rebalancing schools on an annual basis when demographic change, not *de jure* discrimination, caused a school to fall outside the 60/40 racial quota used by CMS as a benchmark for racial identifiability (340a). For example, CMS's quota driven magnet school plan was adopted in 1992 when Dr. Murphy was superintendent for the express purpose of ameliorating the impact of massive demographic shifts on the racial composition of certain schools. (*Id.*). Dr. Murphy admitted it was adopted in response to the "difficulty in bringing about racial balance . . . because of the demographic shifts that were occurring." (25a).

Another essential inquiry in a unitary status case is to determine whether CMS is likely to return to a policy of racial segregation if local control of the school system was restored. Petitioners make no such contention for good reason. First, the case was essentially closed in 1975, when the district court placed it on inactive status believing unitary status was imminent. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 67 F.R.D. 648 (W.D.N.C. 1975). Second, CMS has maintained a well integrated school board throughout the period of court supervision. (*Id.*) At the time of trial and presently, four of the nine board members are black. The long time incumbent Chairman, Arthur Griffin, is black. (*Id.*) The Vice Chairperson, Wilhelmenia Rembert is also black. Moreover, racial harmony on the board is a proud tradition with white members of the board consistently voting with black board members on matters relating to desegregation. (*Id.*) Third, the fact CMS spent millions of dollars in attorneys fees opposing unitary status should send an unequivocal message that it will never return to any policy or practice that racially discriminates against African Americans. The conundrum in this case is CMS's blind spot

regarding discrimination against other races which forced parents to file the suit that restored local control of the school system.

The courts below found "CMS routinely reaffirmed its commitment to integration." (341a). CMS's mission statement had "become a mantra" that openly advocated its long term goal of racial diversity and its ambition to be "the premier urban, integrated system in the nation." (341a).[1] The district court specifically found "no evidence of racial animus or discriminatory intent in any school board actions during the thirty years that CMS has been under court order."(*Id.*) CMS even stipulated that it never "acted with a racially segregative purpose." (*Id.*) Ultimately, the district court found, and the Petitioners now concede, that "[t]here can be no serious contention that CMS has been uncommitted to the *Swann* desegregation orders." (344a). Echoing this finding, the court of appeals observed that "CMS officials cannot imagine life without . . ." the desegregation orders and that it was "struggling to keep the orders firmly in place" despite the fact that they are designed to be temporary. (51a-52a). This led the court of appeals to correctly conclude that "it is unthinkable that CMS will attempt to revive the dual system." (52a). That finding is reinforced by CMS's decision not to appeal from the *en banc* decision of the Court of Appeals declaring the school system to be unitary.

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[1] CMS was so committed to maintaining the 60/40 level of racial integration that a unanimous board advocated building "low-moderate income housing" at public expense throughout the county (341a-342a). CMS even appointed a task force to evaluate and recommend how such construction projects might foster more integrated housing policies that would combat the demographic shifts in Charlotte's population. (342a).

The district court squarely placed the burden of proof for showing the vestiges of past discrimination had been eradicated upon Respondents. (253a). To evaluate the level of racial balance within CMS, the district court applied a standard for evaluating the schools of +/- 15% of the system-wide average of black and non-black students which was clearly "more restrictive than necessary." (259a) Even under this restrictive standard, the district court found, and Petitioners concede, that "CMS has maintained a high level of desegregation since 1970." (262a). During this period, less than 30% of CMS schools have deviated from this racial balance standard for more than three years. (*Id.*) That is, over 70% of CMS's schools have been within this standard for at least 27 years (263a). For thirty years, CMS has never operated an all black or all white school. (*Id.*) In sum, CMS's unchallenged good faith commitment to complying with the desegregation orders bore remarkable fruit which the court of appeals described as "[l]ong periods of almost perfect compliance with the court's racial balance guidelines . . . ." (29a).

Schools that were racially identifiable prior to the desegregation process were aggressively targeted by CMS. Some were closed early on. Others have had a remarkable history of racial balance. Specifically, all formerly black schools were racially balanced "for at least twenty-two years . . . ." (275a). The "overwhelming majority" of formerly white schools remain racially balanced. (276a). Attesting to the sea change Charlotte has experienced demographically, most racially identifiable black schools were once racially identifiable white schools. Their change in racial composition was undisputably due to the massive demographic changes this school system has experienced. (*Id.*)

This "remarkable level of desegregation . . ." was also demonstrated by standard measures of racial balance known as the index of dissimilarity and the index of interracial exposure

which were calculated by Respondents' expert witness, Dr. David Armor, who was the same expert used by DeKalb County, Georgia to analyze the effect of demographic change on the racial composition of schools in *Freeman v. Pitts*, 503 U.S. 467 (1992). (264a). The index of dissimilarity "measures the degree of racial imbalance . . ." and the index of interracial exposure measures the average percentage of white students in schools attended by black students. (*Id.*) Under these measures, CMS has been "'highly desegregated' for about twenty years and 'well desegregated' for the remaining years." (*Id.*)

Compared to other comparable unitary school districts "CMS has achieved a higher degree of racial balance . . . ." (*Id.*). During the first decade of desegregation, Petitioners admit that CMS "wa[s] nearly 100% statistically compliant with the court's orders." (29a nt. 5). This outstanding record of compliance continued and converted CMS from a highly segregated school system in 1970 to one with a thirty year history of at least "well desegregated" schools.

3. The Impact of Demographic Change on Racially Balanced Schools

Respondent's expert witness Dr. Armor described the effect of the demographic changes in Mecklenburg County as "overwhelming . . . ." (28a-29a). The court of appeals described them as "massive." (28a-29a). The district court found demographic changes in two areas: dramatic growth in predominately white suburban populations in the northern and southern portions of Mecklenburg County and increased density and spreading of predominately black inner city populations to formerly white middle suburban areas in the 1970's which then became "predominately black."(238a). Like most major metropolitan areas, Mecklenburg County experienced a "suburbanization trend . . ." whereby "the inner city and nearby suburbs lost large numbers of white residents as they spread further out into communities along the major arteries extending from down town." (238a). This left an inner

city where "blacks are still more concentrated" and outlying areas that became "highly concentrated . . ." with whites (*Id.*).

The courts below determined that there was "no doubt" that the schools experiencing racial imbalance were impacted by demographic change which began effecting certain CMS schools in the late 1980's. (268a). CMS aggressively compensated for racial imbalance caused by demographic change, by "constantly adjusting the boundaries, adding satellite zones and reassigning students to different schools." (*Id.*). CMS vigorously worked to achieve its desired level of racial balancing, even though it had no legal obligation to employ increasingly strict racial quotas to combat demographically caused racial imbalances. (239a-242a).

Petitioners' contention that the increase in Mecklenburg County's black population resulted in greater racial residential integration is "simply not true." (27a). This fact was also conceded by CMS's own school board chairman, Arthur Griffin, who described Charlotte-Mecklenburg as "'a city of segregated neighborhoods' with '[c]oncentrations of black households . . . generally in the central city." (27a). Today, "blacks are still more concentrated near the inner city, and whites have become highly concentrated in the outer peripheries." (238a). By 1992, "[a]pproximately 50% of all black students lived within [the inner city] while only 10% of white students reside [there] . . . ." (*Id.*) The fact black populations began to become increasingly dense in the inner city while the density of white student populations declined directly caused some inner city schools to slip out of the 60/40 racial balance CMS sought for all schools. (*Id.*, 238a). Additionally, the kind of residential integration Charlotte experienced did not directly correlate with racially integrated schools. In part, this is attributable to a decrease in the white student population "which declined sharply in the 1970's and continued to decrease in the 1980's . . ." with only modest increases in the 1990's. (239a - 240a). Furthermore, large numbers of white students do not attend the public schools.

(240a). In Mecklenburg County, private school enrollment is "almost double the national level." (Id.)

The claim that Mecklenburg County's modest residential integration somehow translates into greater school population integration is also "overly simplistic." (267a). Integrated neighborhoods are confined to "pockets . . ." while "looking at the system as a whole, there are still stark demographic contrasts between the inner city and the southernmost and northernmost areas of the county." (Id.) In 1990, "almost half of the county was comprised of census tracts that were less than 10% black." (270a). In the south, thousands of residential building permits were issued where schools were "already seriously overcrowded . . . ." (271a nt. 25). The northern and southern regions encompass census tracts that are "virtually all white." (277a). These areas have experienced significant growth in their white populations. (279a).

Conversely, the inner city is inhabited by a "high concentration of blacks . . . " making it "impractical, if not impossible, to draw contiguous assignment zones in the inner city and racially balance . . ." inner city schools. (273a). Some of the racially balanced schools located in the middle suburban ring that separates the black inner city and the white outer suburbs fell out of racial balance due to a combination of the black student population spreading outward resulting in "a dramatic decrease in the white school age population and a simultaneous increase in black school age population." (238a, 275a-276a). Correspondingly, there is a "high number of whites in this [middle suburban] area who attend private school." (277a). Consequently, "some of the middle suburban communities that were almost all white in 1970 are now predominantly black." (238a).

It is clear that demographic change, not the violation of the desegregation orders, caused the predominately white middle suburban area, which provided reasonably proximate populations of white students for satellite zones or pairing to racially balance schools that had become predominately black,

to effectively disappear. Furthermore, white population growth was in new developments in suburban areas in the far north and south of the county. These predominately black and white regions were so distant that, according to a report prepared by CMS's Assistant Superintendent Jeffrey Schiller, it was "impossible to populate all schools with a 60% non-black - 40% black ratio and still meet a 60 minute bus ride limit." (271a).

4. The Impact of Demographic Change on School Sitings

These "massive" and "overwhelming" demographic changes directly impacted the practicability of siting schools in racially diverse areas of the country. (28a - 29a). Petitioners tacitly conceded the impracticability of siting schools in places other than those selected because they never "called upon the court to intervene in these school citing decisions." (274a) They failed to do so despite the fact that these siting decisions were widely publicized. Likewise, no party at trial was able to identify any suitable alternative sites for the placement of schools that would have fostered more natural integration which was rejected by CMS.

The rapid growth experienced in what had been largely rural areas of the county just twenty years ago caused the schools in the northern and southern portions of the county to become badly overcrowded (23a - 34a). This required construction of new schools. This new construction was also due, in part, to the fact the rush hour traffic patterns made transporting white students from these outer suburbs to inner city schools, impractical due to hour plus bus rides each way (273a).

There was "extensive evidence . . ." that CMS "never sited schools to foster segregation . . . ." (33a) The district court specifically found CMS met the obligation of the desegregation orders to refrain from basing siting decisions "on population growth trends alone." (270a). CMS Assistant Superintendent Jonathan Wells testified CMS routinely considered "racial diversity in its school siting decisions." (*Id.*) In fact, CMS made

"every effort . . ." to site schools to promote racial diversity (33a). Other criteria such as "system [ ] finances, land values, site availability, zoning laws, topography, site size, building capacity, adequacy of public utilities, utilization of adjacent or feeder schools, traffic patterns, and the time and distance to transport students" were also evaluated (270a). CMS was so careful to abide by the desegregation orders that it actually resolved to build schools only where the population was at least 10% black even though compliance with this goal was improbable since "almost half of the county was comprised of census tracts . . ." with less than a 10% black population. (*Id.*) Moreover, strict adherence to the 10% rule would have made it "impossible" to meet the CMS commitment to keeping busing commutes below one hour each way. (271a).

Most schools built since 1980 "have been able to accommodate racially balanced populations every year of their existence." (271a-272a nt. 26). This complied with the desegregation orders which required only that "[b]uildings are to be built where they can readily serve both races." (270a) *quoting Swann v. Mecklenburg County Bd. of Educ.*, 379 F. Supp. 1102, 1107 (W.D.N.C. 1974). Schools built in the last thirteen years have been "in and out of balance" since opening. (272a nt. 26). Yet, demographic change in the form of growth in predominately white areas in the far north and south dictated that schools must be built there (33a). Only four out of twenty-seven new schools have never been racially balanced (*Id.*).

CMS continues to increase "the number of stand alone schools in naturally racially integrated areas. (272a). Indeed, "CMS has purchased property in low growth areas . . . even though schools in predominately white high growth areas continue to be seriously overcrowded and reliant on trailers." (32a) CMS continues to pursue "mid-point" sites despite the fact that schools in high growth outer areas remain "overcrowded and in short supply." (273a).

Ironically, the school siting decisions about which Petitioners complain were "a consequence of racial balancing

requirements." (*Id.*) The district court found that the high concentration of black students located in inner city neighborhoods, coupled with the increasing rush hour traffic problems created by white population growth in the outer areas of the county, caused CMS "to create dozens of tiny satellite zones in the inner city to disperse blacks away while simultaneously drawing white students inward with magnet schools." (274a) If CMS had in fact built more inner city schools in predominantly black areas, it would have "exacerbated this racial balancing dilemma." (*Id.*) The courts below correctly found CMS "coordinated racial balance and school sitings as best it could under the circumstances." (34a).

CMS implemented its magnet school program in 1992, in direct response to the demographic trends that caused the school pairing desegregation technique to "become increasingly unstable. . . ." (242a). Undeniably, these demographic changes began in the early 1980's well before CMS implemented its magnet school program in 1992. (*Id.*, 265a-266a). Dr. Murphy's testimony was conclusive regarding the fact the magnet school program was specifically designed to address the concern "about the increasing difficulty in bringing about racial balance . . . because of the *demographic shifts* that were occurring." (25a). (emphasis added). The magnet school program was intended to replace school pairing and did in fact ameliorate racial imbalances in many schools that lacked an effective pairing partner due to demographic changes. (28a).

5. The Busing Burden Obligation

Similar findings were made regarding transportation burdens. The desegregation order itself recognized that "absolute equality in apportioning the burdens . . ." of busing was "impossible to achieve." (274a). Using this standard, the district court found that 42% of non-blacks and 58% of blacks were involuntarily transported for desegregation purposes. Non-blacks, however, were transported by a greater proportion and for longer periods of time for desegregation purposes under

the magnet school program (275a). The district court concluded that "[g]iven the realities of the situation . . . the current situation may be about the best CMS can do while adhering to racial balancing guidelines." (275a)

6. The Racial Equality of CMS Facilities

The district court found CMS's facilities were maintained without racial discrimination. The desegregation order specifically held there was no racial discrimination in 1969 with respect to "the quality of school buildings and equipment." (293a) The district court found this to indicate "no vestiges of discrimination in facilities . . . ." (294a) Relying on the most comprehensive and objective data available, including CMS's own facilities expert, the district court found no "disparities along racial lines." (300a) In support of this finding, the court noted that CMS's expert gave his lowest rating to four schools. Two (Elizabeth Traditional and Myers Park Elementary) were majority white in predominately white neighborhoods. (*Id.*). Of the two highest rated schools, one was Morehead Elementary which was a predominately black school in a predominately black neighborhood (300a). Most schools (26 out of 42) described by CMS's facilities expert as needing "major improvements" were either predominately white (18) or racially balanced (8) (301a). This demonstrated that "CMS's facilities needs are spread across the system without regard to the racial composition of its schools." (*Id.*) CMS's facilities expert attributed the cause of these facilities deficiencies "to the age of respective facilities." (*Id.*)

This evidence was corroborated by the testimony of CMS's Assistant Superintendent responsible for facilities. He testified that he was unaware of any facts that linked present inequities to past discrimination (302a). He also identified 108 schools "in need of renovations . . . . " (*Id.*) The overwhelming majority of these schools (81%) were racially balanced or identifiably white (40a). He attributed the problem to "a shortage of funds . . . ." (*Id.*)

7. CMS's Monitoring of Magnet School Transfers

Finally, the district court found that CMS did in fact monitor magnet school transfers to ensure they did not adversely impact racial balance. Specifically, CMS's own expert witness admitted on cross examination that CMS "kept an eye on [magnet] transfers so that there wouldn't be a run on the bank so to speak from any one school." (266a-267a nt. 23). Indeed, the district court found, rather than causing segregation, magnet schools "have had an overall effect of countering resegregative trends. . . ." (*Id.*).

ARGUMENT

I. THE CLEAR ERROR RULE

"Proper resolution of any desegregation case turns on a careful assessment of its facts." *Freeman v. Pitts*, 503 U.S. at 474 (1992). When reviewing unitary status cases, federal courts apply a clearly erroneous standard that is highly deferential to the trial court. *Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 533 (4th Cir. 1985); *Coalition to Save Our Children v. State Board of Education of Delaware*, 90 F.3d 752, 759 (3rd Cir. 1996); *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. 1981); *Keyes v. School Dist. No. 1, Denver Colo.*, 895 F.2d 659, 666 (10th Cir. 1990); *Jacksonville Branch, NAACP v. Duval County School Bd.*, 883 F.2d 945, 952 nt. 3 (11th Cir. 1989). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574 (1985).

This case has been extensively reviewed and considered by the district court and the Fourth Circuit Court of Appeals sitting *en banc*. The Petitioners have not shown the courts below made any material findings which were clearly erroneous, nor have they identified any determinative error of law which would meet this Court's standard for the granting of a Writ of Certiorari. Essentially, Petitioners disagree with the district court's findings of facts. Yet, for every allegation of fact made in the petition, the district court made a corresponding

contradictory finding of fact based on evidence in the record. This kind of disagreement does not warrant granting the petition. Under this court's rules, petitions presenting such matters for review are "rarely granted . . . ." Rules of the S.Ct. of the United States 10.

II. THE TEMPORARY REMEDY RULE

This school desegregation case began in 1965 (10a). A desegregation order has been in place and the school system has been well desegregated for over thirty years. During that time, two generations of students have passed through CMS. Despite this court's admonition that desegregation remedies are designed to be temporary measures with an end purpose of restoring local control over schools, CMS and Petitioners transformed the desegregation orders from temporary measures designed to remedy past discrimination into "mechanisms for the attainment of different goals." (52a); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). More specifically, CMS wanted the permanent insulation of court supervision to rationalize and perpetuate race-based student assignment plans to foster racial diversity rather than desegregation. As this court said in this case "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28 (1971). The evidence of CMS's good faith efforts to desegregate its schools was overwhelming. Petitioners acknowledge that CMS has always demonstrated to the court, the public, and to black parents "its good-faith commitment to the whole of the court's decree. . . ." *Freeman*, 503 U.S. at 491. In fact, CMS went too far in its pursuit of racial balance. As described by the court of appeals, the desegregation orders were "institutionalized" to the degree that CMS cannot "imagine life without them . . . ." (51a) Indeed, both Petitioners and CMS did everything within their power "to keep the orders firmly in place" despite CMS's duty under *Freeman* and *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) to seek restoration of local control (52a). CMS's good faith

commitment to the desegregation orders was so solid the court of appeals concluded it was "unthinkable that CMS will attempt to revive the dual system." (*Id.*)

Now, after decades of highly racially balanced schools, thirty years of good faith compliance,[2] and not a single objection by Petitioners regarding CMS's compliance with the desegregation orders, Petitioners now claim that CMS's rigorous regime of racial quotas, widespread forced busing and annualized efforts to racially rebalance all schools, was not enough, and that court supervision must be reactivated and continue indefinitely. Despite decades of silence, Petitioners suddenly speak of "violations" and "ignored" court orders only because it now appears that the desegregation process has worked. If Petitioners "had ever truly believed a significant violation of the . . . decree had occurred, they certainly would have brought it before this court to seek enforcement of the decree . . . ." *Dowell v. Board of Educ. of Oklahoma City*, 8 F.3d 1501, 1512 nt. 8 (10th Cir. 1993). Petitioners' deafening silence for nearly thirty years means they have "all but conceded good-faith compliance . . . ." *Id.*

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[2] Since the desegregation orders were entered, CMS has always maintained a system that was "well desegregated." (264a). For the first twenty years of this desegregation order, CMS was "highly desegregated" and for the first decade of the order, CMS was nearly perfectly desegregated. (*Id.*; 29a nt. 5). By comparison, the school system held unitary in *Freeman* was only desegregated "for . . . a short period under the court-ordered plan . . . ." *Freeman*, 503 U.S. at 478.

A. The Declaration of Unitary Status Does Not Conflict with Other Circuits and Does Not Decide an Unsettled Question of Federal Law

Well settled standards now govern the unitary status inquiry. See *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Freeman v. Pitts*, 503 U.S. 467 (1992). The circuit courts have uniformly followed these decisions in declaring numerous school systems unitary. *See Dowell*, 8 F.3d 1501; *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752 (3rd Cir. 1996); *Lockett v. Board of Educ. of Muscogee*, 111 F.3d 839 (11th Cir. 1997); *Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999); *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073 (7th Cir. 2001); *Manning v. School Bd. of Hillsborough County*, 244 F.3d 927 (11th Cir. 2001); *cert. den.* _____ U.S. _____, 122 S.Ct. 61, 151 L.Ed.2d 28 (2001); and *NAACP, Jacksonville Branch v. Duval County Schools*, 273 F.3d 960 (11th Cir. 2001). The Fourth Circuit's decision in this case is consistent with the cited decisions of the Third, Sixth, Seventh, Tenth and Eleventh Circuits.

The Fourth Circuit's decision in this case does not conflict with the decisions in these other unitary status cases and does not plow new ground of unsettled law. Despite the fact that many of these circuit decisions applying *Freeman* and *Dowell* guided the Fourth Circuit, Petitioners cite none of them. Yet, these decisions followed the same path as this case, applying the principles this court established in *Freeman* and *Dowell*. Therefore, it is clear that no circuit conflict and no unsettled questions of law require this court's review of this case.

In *Manning v. School Board of Hillsborough County*, *supra*, the Eleventh Circuit held the Hillsborough County Schools were unitary where current racial imbalances were found to be substantially caused by demographic change. *Manning*, 244 F.3d at 946. Like Petitioners, the plaintiffs in *Manning* argued that demographic shifts were not the sole cause of racial

imbalances. *Id.* This court, however, declined to review *Manning*. It should do the same in this case because no new issues are presented.

On October 1, 2001, this Court denied certiorari in *Manning*, *supra*, a school desegregation case which Petitioners described in their briefing before the court of appeals as having "statistics of compliance and demographic patterns very similar to those in CMS." (Swann Plaintiff's Appellate Brief pp. 39-40). Curiously, Petitioners have not cited *Manning* in this Court. This Court should decline to hear any unitary status issues in this case for the same reasons it declined to hear *Manning* since it presents no conflict with the decisions of this Court or the circuit courts.

B. CMS's Magnet School Program Did Not Resegregate and Was Tacitly Approved of by Petitioners

Petitioners' admissions, concessions, and conduct, as thirty year parties to this case deflate their current claims that the courts below erred. For example, Petitioners do not challenge the appeals court's holding that CMS had "[l]]ong periods of almost perfect compliance with the court's racial balance guidelines, coupled with some imbalances in the wake of massive demographic shifts . . . ." (29a). Instead, Petitioners' appellate strategy is to myopically complain about CMS's 1992 magnet school plan which they contend caused "a number of schools" to fall "outside of racial enrollment guidelines" (Petition at 16). However, Petitioners do not identify any particular schools that became racially identifiable by an alleged failure to monitor magnet school transfers. Magnet schools had an integrative effect on CMS rather than the alleged segregative effect.

Petitioners concede the district court's findings that "magnet schools have had an overall effect of countering resegregative trends, and a higher percentage of black students would have attended predominately black schools had the magnet schools not existed." (266a nt. 23). The district court specifically found

magnet schools racially balanced six racially identifiable schools (266a). Accordingly, there is no evidentiary support for Petitioners' conclusory assertion that CMS's increase in the number of magnet schools increased the number of racially identifiable schools.

Dr. Murphy, the Superintendent that implemented the magnet school program, testified it was specifically designed to combat racial imbalances caused by demographic change (25a). It is therefore axiomatic that the racial imbalances caused by demographic change had to occur before implementation of the magnet school program(265a). The magnet school program "helped to restore and maintain racial balance in schools that were rapidly becoming imbalanced" due to demographic changes (266a nt. 23, 28a), and CMS's own expert testified that CMS did monitor magnet school transfers (266a nt. 23) to insure they had the desired ameliorative systemwide effect on racial balance. Remarkably, Petitioners omit any reference to their own expert witness who conceded at trial that magnet schools never caused a school to fall out of compliance with the desegregation orders (Trial Testimony of Leonard Stevens, pp. 182-183).

Petitioners' disagreement about the inferences properly drawn from these facts by the courts below does not warrant this Court's review by writ of certiorari. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Clearly, the district court held that it was beyond doubt that "demography and geography have played the largest role in causing imbalance." (268a). This Court has said "the school district is under no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971). More specifically, in light of the uncontested evidence of "[l]ong periods of almost perfect compliance . . . coupled with some imbalance in the wake of massive demographic shifts . .

." this Court has held that "it becomes less likely that a current racial imbalance . . . is a vestige of the prior de jure system." (29a) *Freeman*, 503 U.S. at 496. When viewed in light of CMS's unchallenged good faith efforts to eradicate the dual system, any causal link to the dual system "is even more attenuated . . . ." *Id.*

C. *Freeman* is Controlling Authority in this Case

Petitioner's argue this case in distinguishable from *Freeman* because of the 1992 implementation of the magnet school program. However, because the magnet school program was adopted in an effort to counteract demographic change, the case falls squarely within *Freeman's* holding that demographic changes and the efforts to combat them do "not have constitutional implications." *Freeman*, 503 U.S. at 495. Conspicuously, Petitioners do not claim that CMS's decision to implement magnet schools violated the desegregation order. That is because Petitioners effectively approved of this effort to combat demographic change by not objecting in the district court until the unitary status trial held over seven years later. Moreover, the magnet schools were found by the district court to have had a positive, integrative effect on the school system as a whole (266a nt. 23). Since CMS's increase in magnet schools was motivated by constitutionally inconsequential demographic changes, *Freeman* controls this case and Petitioners' disagreement with this application of the law does not warrant review by this court.

Petitioners' also attempt to distinguish *Freeman* by alleging that the demographic change in this case was not as significant as that presented in *Freeman*. However, the district court found, and Petitioners concede, that there was no evidence "that CMS has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools." (268a) "In fact, the opposite is true; CMS openly encouraged and endorsed policy initiatives that promote integrated communities." (*Id.*) The district court found

demographic change was the causal agent for all racial imbalances in CMS. The court of appeals described these demographic changes as "massive . . ." and adequately explained "why a few schools have become imbalanced." (29a). Furthermore, even though it was not obligated to do so, CMS instituted changes in its student assignment practices to counteract what one expert witness described as "overwhelming demographic growth and mobility."(28a)

There is no requirement under *Swann* and *Freeman* that demographic change must be of a certain magnitude to qualify as a change that lacks constitutional significance. *Freeman* does not require the qualifiers of "massive" or "dramatic" demographic change as a condition of its holding that school districts are under "no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494. Rather, Freeman merely establishes that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications." *Id.* at 495. In this very case, this court has said "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies. . ." when demographic change causes imbalanced schools. *Swann*, 402 U.S. at 31-32.

This conclusion is identical to those reached by other appellate courts under substantially identical circumstances. *See Manning*, 244 F.3d at 944, *cert. den.* _____ U.S. _____, 122 S.Ct. 61 (demographic change substantially caused racial imbalances); *United States v. Meriwether County*, 171 F.3d 1333, 1339 (11th Cir. 1999) (demographic change need not be reversed); *Dowell*, 8 F.3d at 1517 (residential segregation not traceable in a proximate way to segregated schools) *Lockett*, 111 F.3d at 843 (racial imbalances due to demographic change not causally linked to past discrimination); *Reed*, 179 F.3d at 467 (demographic changes causing racially imbalanced schools do not prevent unitary status); *Duval County School Bd.*, 273 F.3d at 972 (unitary status proper because school board not

responsible for segregative effects of demographic change). In each of these cases, the demographic change that caused the racially imbalanced schools was comparable to that which was found to operate in Charlotte-Mecklenburg. In each case, unitary status was found to be proper. Given the uniformity of the circuits on this issue, there is no reason for this court to intervene and provide guidance where all circuits are in accord on how *Freeman* is to be applied in unitary status cases.

The court of appeals directly addressed Petitioners' argument at length concluding that "*Freeman* cannot be distinguished into nothingness, nor does the standard of review permit this court to re-weigh the evidence of the changes in CMS." (27a). Yet, Petitioners persist by making the same arguments in this Court they made below and requesting this court's review of this case merely because they disagree with the holding of *Freeman*. This is quintessentially the type of case that does not warrant the granting of a writ of certiorari. Supreme Court Rule 10(b).

D. CMS's School Siting Decisions Complied with the Desegregation Orders

Petitioners' arguments regarding school siting are inextricably intertwined with the impact which racial demographic change had on CMS's student assignments. Indeed, CMS's school siting decisions were driven by a combination of factors outside of its control such as demographic change, geography and its court ordered racial balancing obligations. Petitioners falsely claim that the desegregation orders "required CMS to locate schools in places readily accessible to both races . . . ." (Petition at 20). Actually, the desegregation orders were less restrictive than Petitioners imply, requiring only that school siting "**was not to be predicated on population growth trends alone**" and that "consideration is to be given to the influence new building can be toward simplification of an integrated student assignment plan." (270a), citing, *Swann*, 379 F. Supp. at 1107 (emphasis added).

Since 1980, fifteen out of the twenty seven new schools have always served both races and an additional six have gone in and out of racial balance (272a nt 26). These schools readily serve all races. Based upon the undiputed evidence that 21 out of 27 schools built since 1980 have served both races, the district court concluded there were no "continuing violations in the area of school siting." (274a).

Of the remaining six schools, four were built in areas that underwent dramatic demographic change in the form of explosive population growth that caused existing schools to be "overcrowded and in short supply." (273a). The desegregation decree specifically acknowledged that overcrowding was "unrelated to desegregation . . ." and "not a constitutional problem . . . ." *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 334 F. Supp. 623, 631 (W.D.N.C. 1971). The district court also concluded that CMS's school siting decisions were "a consequence of racial balancing requirements" which, when coupled with traffic problems, and geographic and demographic challenges, meant that CMS had little choice but to place the schools where it did. (273a). Petitioners concede that CMS did not site schools based "on growth trends alone," but "routinely . . ." considered "racial diversity in school siting decisions" together with a host of other race neutral criteria. (270a).

E. *Penick, Brinkman* and *Swann* are Inopposite

Contrary to Petitioners contention, the court of appeals did not ignore *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979). *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) or *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). None of these cases are implicated by this record because they dealt with school board action that was not prompted by intervening demographic change. In *Freeman*, this court specifically distinguished *Penick* and *Brinkman* in the context of findings that demographic change rather than the absence of school board good faith, caused racial imbalances. *Freeman*, 503 U.S. at 494. In this case, the appeals court found

that CMS's school siting obligations and demographic change that created overcrowding "pulled CMS in different directions. . . ." (34a) *Freeman* resolves this dilemma by holding that school systems have "no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494. CMS did not create the demographic changes it was required to address. Accordingly, *Penick* was irrelevant to the facts before the Fourth Circuit because it involved a school system abdicating its good faith compliance duty. By contrast, this case involves a school system acting in good faith in response to demographic change as allowed by *Freeman*.

This case does not implicate "the continuing vitality of the principles established in *Swann* and *Penick* . . . ." (Petition for Writ of Certiorari at 20). Instead, this case involves vastly different facts than *Penick* and *Swann* which *Freeman* itself distinguished. *Swann* itself acknowledged that "in the absence of a showing that . . . school authorities . . . deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." *Swann*, 402 U.S. at 32. Most importantly, this case, unlike *Swann* and *Penick*, involved *Freeman's* teaching regarding how demographic change impacts the unitary status inquiry after nearly thirty years of good faith desegregation efforts. Therefore, *Swann* and *Penick* remain viable; albeit of no relevance to the resolution of this case.

III. THE COURT OF APPEALS DID NOT APPLY AN INTENTIONAL DISCRIMINATION STANDARD FOR ASSESSING WHETHER ANY CONTINUING VESTIGES OF PAST DISCRIMINATION EXISTED IN FACILITIES, TRANSPORTATION AND SCHOOL SITING

Petitioners seem to misunderstand the rationale for the courts' conclusions that CMS did not operate racially discriminatory facilities. The court did not uphold unitary status because there was no intentional discrimination. Instead, the

court found that any disparities were attributable to factors other than race such as "the age and location of the facilities and the ever-present problem of allocating all to scarce funds." (40a-41a) In other words, the conditions of CMS's facilities were caused by forces outside of its control and, just as the district court found in 1969, it concurred in 1999 that there was no constitutional violation regarding facilities (42a).

The lower courts also concluded CMS did not violate the desegregation orders with respect to school siting. The court of appeals cited record evidence that CMS affirmatively made "every effort" to site schools that would foster integration (33a). Far from following an intent standard, the lower courts relied on hard evidence that showed CMS took affirmative steps to comply with the school siting provisions of the desegregation orders, and affirmatively complied with its school siting obligations (33a-35a).

Likewise, regarding busing burdens, the lower courts concluded that CMS complied with the court's orders to the extent practicable (35a). The courts below consistently applied a standard that was more vigorous than intent when assessing whether CMS eradicated all vestiges of past discrimination. Specifically, they applied this Court's standard in *Dowell* and *Freeman* which focuses the "effectiveness"analysis on "whether the vestiges of past discrimination had been eliminated to the extent practicable." *Dowell*, 498 U.S. at 250, *Freeman*, 503 U.S. at 492.

IV. CMS COMPLIED WITH ALL DESEGREGATION ORDERS TO THE EXTENT PRACTICABLE

The courts below specifically found CMS complied with all desegregation orders (long periods of almost perfect compliance, 29a; school siting compliance, 32a; busing burdens compliance, 35a; student transfer compliance, 36a). Petitioners have no evidentiary basis for their claim that "the trial record showed that the system had never complied with express orders designed to further desegregation." (Petition at 23). Petitioners'

assertions that CMS "admitted" non-compliance ignores the collusive alignment of Petitioners and CMS at trial. CMS wanted to remain under the race-conscious student assignment plan for the foreseeable future in order to use the desegregation orders as a shield and pretext for the racial quotas it believed fostered "diversity."

The district court specifically found CMS resisted a declaration of unitary status and allied itself with Petitioners "because it now wishes to use that order as a pretext to pursue race-conscious, diversity enhancing policies in perpetuity." (227a) The appeals court likewise found CMS was using the desegregation orders as "mechanisms for the attainment of different goals" than eradicating vestiges of past discrimination (52a). Accordingly, Petitioners' allegations of "admitted" non-compliance must be seen for what it is, a collusive effort to indefinitely perpetuate race-conscious student assignments in CMS even though the facts showed all vestiges of past discrimination have been eradicated to the extent practicable. This baseless allegation of a "record of non-compliance . . ." was thoroughly addressed by the lower courts and found to be factually meritless. *Id.*

The lower courts found CMS complied with all of its desegregation duties to the extent practicable (55a, 345a). Petitioners again confuse practicability with possibility and seek this court's review because they claim it is still possible to do more racial balancing. But, "[r]acial balance is not to be achieved for its own sake." *Freeman*, 503 U.S. at 494. This court's standard for assessing whether court supervision is necessary is focused on whether "these vestiges of past discrimination had been eliminated to the extent practicable." *Freeman*, 503 U.S. at 492. Following *Freeman*, the court of appeals addressed Petitioners' argument by observing that adopting their standard "would effectively replace *practicability* with *possibility*." (34a)

Applying *Freeman's* practicability standard, the court of appeals addressed Petitioners' school siting complaints. It

concluded that a host of limitations beyond CMS's control including, population growth in Mecklenburg's far north and south areas, the desegregation decree itself, and traffic burdens limited what CMS could practicably do in selecting sites for new schools (34a-35a). However, as the court stated, "a plethora of evidence . . ." demonstrated that CMS "used its best efforts to site schools in order to foster integration . . . ." (35a) Curiously, Petitioners concede this point describing the "heart of the Dowell/Freeman test . . . ." as requiring school systems to "eliminate the vestiges of past discrimination to the extent practicable." (Petition at 25). Once again, Petitioners' disagreement with the findings of fact below do not warrant this Court's review.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING A NEW STUDENT ASSIGNMENT PLAN DEVELOPED JUST PRIOR TO TRIAL

Petitioners also seek a writ of certiorari based on a routine evidentiary ruling based on Rule 403 of the Federal Rules of Evidence. Such a ruling obviously presents no conflict in the circuits and does not implicate any decision of this court. It hardly qualifies as one of the "compelling reasons" contemplated by Supreme Court Rule 10.

Petitioners do not fully disclose all the relevant facts surrounding the district court's evidentiary ruling during the trial concerning CMS's so-called "remedial plan." CMS developed this theoretical assignment plan "at the eleventh hour," and presented it to the court and Respondents one week before trial in violation of the court's pretrial orders, "after the deadlines for fact discovery and expert witness discovery had expired . . . ." (280a nt. 28 - 281a). Even though the district court actually considered and admitted substantial portions of the excluded "evidence," it declined to admit this untimely and "certainly cumulative" compilation of documents, which was

devised as an "eleventh hour strategy." (*Id.*). This evidence largely consisted of expert reports which were actually admitted at trial and considered at length by the district court. (282a, 54a). The court of appeals held this type of evidence was discretionarily excludable, citing *Fed. R. Evid.* 403. (54a).[3]

The district court found "that CMS has complied fully and satisfactorily with the student assignment aspects of the court ordered desegregation plan" and that all vestiges had been eliminated (283a). As a result, there was no need to consider the remaining proposals in the plan to eradicate any alleged vestiges which did not exist. (Id.). The court of appeals affirmed this reasoning pointing out that the district court "did address compliance . . .". (53a). Because the district court also found that CMS's past compliance successfully eradicated all vestiges of past discrimination (227a, 345a), any consideration of future racial balancing was irrelevant because the district court found that any existing imbalances were caused by demographic change, geography and other factors outside of

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[3]Importantly, the district court did not foreclose considering those parts of the so-called "remedial plan" relating to a proposed future student assignment plan if it determined that all vestiges of past discrimination had not been eradicated to the extent practicable (280a nt. 28, 374a). Accordingly, the court excluded the cumulative portions of the plan and withheld considering the remaining part of the plan, which consisted of a new, untested "controlled choice" student assignment plan until such time as it appeared that further remediation of vestiges was necessary. (*Id.*, 280a nt 28, 281a).Essentially, the court decided that the order in which it would consider CMS's "evidence" required, as *Freeman* dictates, that it first evaluate whether vestiges of past discrimination remained in CMS and only then was it willing to determine if additional, allegedly practicable measures were necessary to eradicate those vestiges (*Id.*).

CMS's control. (268a). This is precisely what *Freeman* requires since "[o]nce the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 503 U.S. at 494 citing *Swann*, 403 U.S. at 31-32. Demographically caused imbalances have no "constitutional implications" and are beyond the court's "practical ability . . . to try to counteract . . . ." *Id.* at 495. Under *Freeman*, the district court correctly concluded that CMS "had no duty to achieve system wide racial balance in the student population." *Id.* at 496. *Freeman* explicitly rejects the notion that "heroic measures must be taken to ensure racial balance in student assignments system wide." *Id.* at 493. Consequently, the district court's evidentiary ruling to exclude the cumulative portions of CMS's plan, and delay consideration of the remainder of the plan focused on further racial balancing until after it evaluated whether existing imbalances were vestiges of past discrimination was not error.

Petitioners' argument that the district court erred by refusing to consider CMS's proposed remedies prior to determining if there remained any vestiges effectively places the cart before the horse. Petitioners' argument assumes there were continuing vestiges in need of remediation. As Petitioners would have it, the district court committed reversible error by refusing to consider remedies before identifying lingering constitutional violations. But *Freeman* requires exactly the opposite. Under *Freeman*, a district court must first determine whether racial imbalances are traceable to de jure discrimination before evaluating the practicability of proposed remedies. *Freeman* explicitly states that a district court "may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations." *Freeman*, 503 U.S. at 491. *Freeman*, and simple logic, require that a district court's vestiges analysis must precede any remedies inquiry. That is exactly what the district court did and what the court of appeals affirmed.

CONCLUSION

Over thirty years ago, CMS implemented a court ordered desegregation plan, which this Court has held was designed "[f]rom the very first, . . . as a temporary measure to remedy past discrimination." *Dowell*, 498 U.S. at 247. In the course of those thirty years, CMS has always maintained at least a "well desegregated" school system (264a). For the first ten years CMS was almost perfectly desegregated. For twenty years, CMS maintained a "highly desegregated" system. With the grant of unitary status, the "end purpose" of remedying past discrimination and restoring local control of the Charlotte-Mecklenburg Schools has been accomplished. *Freeman*, 503 U.S. at 490.

While it is common "for plaintiffs in school desegregation cases to allege . . . that racial imbalances in student assignments, are a 'vestige of discrimination'" nothing could be further from the truth in this case. *Manning*, 244 F.3d at 942. CMS, as demonstrated by overwhelming evidence, has acted in good faith to comply with the desegregation orders and has demonstrated that "it is unthinkable that CMS will attempt to revive the dual system." (52a) CMS's eradication of the dual system was so complete that it "institutionalized" the desegregation orders to the point that it abandoned their remedial purpose only to use them "for the attainment of different goals." (51a - 52a) On this record, there can be little doubt that the objectives of school desegregation have been entirely accomplished in CMS.

Petitioners have failed to demonstrate any reasons why the decisions of the lower courts should be reviewed. They offer only disagreement with the factual findings of the district court together with arguments premised on misguided interpretations of this court's school desegregation precedents. They concede that the Fourth Circuit's decision is compatible with the decisions of all appellate courts in the area of school desegregation and that there are no important undecided questions presented by this case. Rather, Petitioners' goal is

simply to prolong court supervision of this case well beyond any rational limits. For these reasons, their Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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